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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. A-1272

Supreme Court, U. S.
FILED
AUG 9 1973

HEART OF THE BLACK HILLS STATIONS,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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HEART OF THE BLACK HILLS STATIONS,

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FEDERAL COMMUNICATIONS COMMISSION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner prays for Writ of Certiorari to be issued to review the judgment of the Court of Appeals for the District of Columbia entered February 26, 1973, affirming the order of the Federal Communications Commission entered on November 1, 1971, and reported at 32 FCC 2d 169 (1971) and the order of the Federal Communications Commission dated August 1, 1972, denying Petitioner's petition for a reconsideration.

OPINIONS BELOW

An initial decision of the Hearing Examiner, Thomas Donahue, of the Federal Communications Commission, dated July 17, 1970, 32 FCC 2d 201 (1971) (Appendix A).

A decision and order of the Federal Communications Commission was filed on November 1, 1971, denying applications of the Petitioner for renewal of licenses of the television broadcast stations KRSD-TV, Rapid City, and KDSJ-TV, Lead, South Dakota, reported at 32 FCC 2d 169 (Appendix B).

An opinion denying Petitioner's Petition for Reconsideration was denied by the Commission on August 1, 1972, and reported at 36 FCC 2d 568 (1972) (Appendix C).

A judgment of the United States Court of Appeals, District of Columbia, dated February 26, 1973, affirming the orders of the Federal Communications Commission (Appendix D).

JURISDICTION

The Judgment of the Circuit Court of Appeals was entered on February 26, 1973, a timely Petition for Rehearing was denied by the court on May 11, 1973. The jurisdiction of this court is invoked under the provisions of 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Did the Commission fail to abide by the public interest requirement of the Communications Act, 47 U.S.C. §309(a)?

2. Did the Commission's failure to act upon Petitioners' applications for construction permits to

construct a new antenna, transmission lines and other improvements prevent Petitioners from remedying the very technical violations upon which the Commission based its denial for renewal of Petitioners' license?

3. Was the Commission's reliance on the 1966 waiver of the CATV protection requirements an insufficient basis for its findings and decision and constitute a denial of due process to the Petitioners?

4. Was the Commission's finding that Petitioners had a decade of serious technical violations and that said violations were continuing without substantial support in the record?

STATUTE INVOLVED

The Federal Communications Act, 47 U.S.C. §151 et seq.; 47 U.S.C. §155(e); 47 U.S.C. §309(a).

STATEMENT OF THE CASE

This case involves the denial of application for the renewal of licenses for the Petitioners' broadcasting stations, KRSD-TV at Rapid City and KDSJ-TV at Lead, South Dakota.

The Petitioners, Eli and Harry Daniels, are brother-partners and owner-operators of the licensed stations since 1957 (KRSD-TV) and 1959 (KDSJ-TV).

They were pioneers in bringing television to western South Dakota where the market is admittedly small, competitive and located in a sparsely populated area. They have been beset with usual problems confronting a pioneer; including, costly updating of equipment made obsolete with the rapid advance of technology, insufficient trained manpower, a fallible source of

network signal, manpower shortage, and an uncooperative weatherman. (Appendix A—p. 3a, 27a)

A renewal hearing before the Hearing Examiner in 1968 found technical violations, mainly an inferior broadcast picture and spurious emissions. In 1967 a tornado had seriously damaged the antenna structure of KRSD-TV and in January 1968, Petitioners filed with the Commission an application for construction permit for a new antenna and transmission line to replace the equipment damaged during the tornado. *No action has ever been taken by the Commission on this application.* (JA-32-35, 148-153, 296)

The failure of the Commission to follow the statutes and its rules and to take any action on the application, left the Petitioners operating with a temporary antenna and without an opportunity for a more complete replacement of equipment until the Commission acted upon their application. Thereafter, the television stations received citations from the Commission for technical violations. Such violations were again, for a large part, related to the deficiencies in the transmission line and antenna, improvement in which the Commission, by its refusal to act, had effectively prevented.

In 1966 a citation for technical violations was made by a Commission engineer complaining that the broadcast picture was of inferior quality and viewers were dissatisfied. The violations cited by the F.C.C. Engineer in 1961 and 1966 were satisfactorily answered or corrected by the Petitioners to the Engineer (JA-50, 51). The technical violations consisted of temporary microwave problems which were corrected (JA-51).

The Commission's rules gave existing television stations, such as KRSD-TV, certain protection on CATV systems, primarily carriage and non-duplication. Carriage

rules required that CATV system must carry the local television station on one of its channels. Non-duplication required that the CATV could not carry another station which broadcasted the same program as the local station to avoid broadcasting of the same network program on separate channels. The CATV Company operating in Rapid City asked for a waiver of both carriage and non-duplication requirements for the reason that KRSD signal was temporarily not viewable. The Petitioners did not respond immediately and the Commission; in 1966, did grant a requested waiver of the carriage and duplication requirements as to KRSD. In September 1966 Petitioners applied to the Commission to vacate the waiver and restore the carriage and non-duplication protections for the reason that it was then transmitting an acceptable signal, on which the Commission never acted. Shortly thereafter the CATV and Petitioners voluntarily agreed to a non-duplication agreement and CATV requested rescindment of its waiver request, which was never acted upon by the F.C.C. (Appendix C—p. 17c)

The Hearing Examiner, after hearing, released his initial decision July, 1970, finding that upon balancing various technical deficiencies at various times against the improving performance of the Petitioners and evidence of improvements of the technical performance by the Petitioners and taking into consideration in his opinion, factors which were beyond the control of the Petitioners, granted a one year short term renewal. (Appendix A—p. 27a)

Exceptions and a brief in support thereof were filed by the Commission's Broadcast Bureau. The Commission reversed the Examiner by decision and order of November 1, 1971, and denied renewal of the Petitioners' licenses. (Appendix B)

The Petitioners petitioned for reconsideration which was denied by the Commission on August 1, 1972 (Appendix C). The orders of the Federal Communications Commission were affirmed on appeal to the Court of Appeals for the District of Columbia on February 26, 1973. (Appendix D)

REASONS FOR GRANTING WRIT

I.

THE COMMISSION IGNORED THE PUBLIC INTEREST REQUIREMENT OF THE COMMUNICATIONS ACT, 47 U.S.C. §309(a).

The Hearing Examiner concluded that it would be in the public interest to grant a renewal of the license to the Petitioners and stated:

"(3) The Examiner is by no means unaware of the ease with which the public interest baby can be emptied out in a tears-of-sympathy bath. On the other hand he is convinced that the sweep of the public interest standard is not so narrow as to preclude thoughtful consideration of extenuating circumstances that may accompany conduct that otherwise would call for preemptory termination of stewardship. Here the licensees are sore beset. They pioneered their field. They work hard for small remuneration. Their market is small. Their competition is great. Their purse is thin. They suffer manpower shortage. Some of their basic equipment is inefficient. Their source of network signals is fallible. The weather is their enemy. And, it should be noted that called to account they have not been cavalier but, rather, cooperative. Moreover, their efforts at reform have met with some success.

"(4) The question of whether or not to renew is a hard one. On the one hand is the need to protect the

> public from incursions on its interest by the incompetent and inept. On the other hand, it is no easy matter to take the bread and butter out of men's mouths. In the order clause below the Examiner has attempted to reconcile these conflicting considerations." (Appendix A—p. 26a)

The conclusion was sound and practical in view of the circumstances. Public interest for western South Dakota is far different than public interest for large metropolitan areas. The public interest in western South Dakota will be best served by the operation of a technically inferior television station, offering a variety of access to network programming rather than a deprivation to the public of such technically inferior broadcasting without a perfect replacement. A perfect replacement does not seem in the realm of possibility as set forth by the evidentiary conclusions of the examiner; i.e. small market, manpower shortage and insufficient capitalization. Rapid City and Lead, South Dakota, are rural areas. There is no substantial reason to believe that any new applicant or replacement licensee could profitably furnish better service to the public based on these market conditions, with the result that the public interest will be overcome with a monopoly by the strong competitor. The general policy of the Communications Act, evidenced by congressional history as it relates to broadcasting, is the promotion of competition. *Federal Communications Commission v. Sanders Bros. Radio Station*, 309 U.S. 470, 84 L.Ed. 869, 60 S.Ct. 693; *Joseph v. F.C.C.* (CA-DC), 404 F.2d 207; *Carroll Broadcasting Co. v. F.C.C.* (CA-DC), 258 F.2d 440.

II.

DENIAL OF DUE PROCESS

THE COMMISSION'S FAILURE TO ACT UPON PETITIONERS' APPLICATIONS FOR CONSTRUCTION PERMITS AND OTHER IMPROVEMENTS, TO CONSTRUCT A NEW ANTENNA AND TRANSMISSION LINES PREVENTED PETITIONERS FROM REMEDYING THE VERY TECHNICAL VIOLATIONS UPON WHICH THE COMMISSION BASED ITS DENIAL FOR RENEWAL OF PETITIONERS' LICENSE.

In January of 1968, the Petitioners filed with the Commission its application (BPCT-4077) for construction permits for construction of a new antenna and transmission line to replace the equipment damaged in the tornado of 1967. (JA-32-34, 148-153, 296) (TR-321-323). 47 U.S.C. §155(e) requires the Commission to promptly and orderly conduct its business with the objective of rendering a final decision within three months from the date of the filing of all applications which are not designated for hearing. No action has ever been had on the Petitioners' applications and the Commission has indicated, in its decision, that no action was ever contemplated. In its decision the Commission refers to its "policy" of not acting on major facility changes during the pendancy of a renewal hearing. (Appendix C–12c)

The applications for construction permits were filed in January 1968, some nine months before the renewal hearings. This "policy" is directly in violation of the statutory mandate and has effectively denied the Petitioners the opportunity to construct facilities which would largely remove the technical violations and deficiencies upon which the Commission relied. (JA-129-131, 134-136) Congress obviously had in mind a concept

of due process to parties petitioning for construction permits before the Commission, and the Commission, by its failure to follow the congressional mandate, has effectively denied the Petitioners due process of law in its relations with the Commission.

Citizens Communication Center v. Federal Communications Commission (CA-DC), 447 F.2d 1201. *The City of New York Municipal Broadcasting System v. Federal Communications Commission* (CA-DC), 223 F.2d 637; *U.S. v. Storer Broadcasting Co.*, 76 S.Ct. 763, 351 U.S. 192, 100 L.Ed. 1081.

III.

THE COMMISSION'S RELIANCE ON THE 1966 WAIVER OF THE CATV PROTECTION REQUIREMENTS WAS AN INSUFFICIENT BASIS FOR ITS FINDINGS AND DECISION AND CONSTITUTES A DENIAL OF DUE PROCESS TO THE PETITIONERS.

The Commission, in its decision and order, relied heavily on the inference that KRSD had, in 1966 and continuously thereafter, an inferior signal based upon the Commission's order in 1966 granting to the local CATV a waiver of CATV rules. (Appendix B–3b) The Commission's rules governing the operation of CATV systems require that said system must carry the signal of any local television station and an additional requirement of non-duplication of any program of a local station of another CATV channel.

The requirement of non-duplication is designed to prevent the audience of a local TV station from being diverted to another originating station foreign to the community. The local CATV, in its request, was granted a waiver of the carriage and non-duplication rules on the basis that the Petitioners broadcast signal was too poor to be usuable by the CATV system.

The temporary waiver of the rules granted by the Commission was made before the Petitioners had an opportunity to object and a permanent stay was issued in February of 1966. Based on the foregoing, the Commission, in its opinion, inferred unfavorable to the Petitioners, that the Petitioners' poor signal had continued since January of 1966.

> "In this regard, we find it to be particularly relevant that we were compelled in 1966 to grant an unusual waiver of our CATV carriage and non-duplication rules (Section 74.1103) to the Rapid City CATV system, because KRSD-TV was providing a signal of such poor quality that it was not usable by the cable system. Black Hills Video Corporation, 2 FCC 2d 243 and 465 (1966). Accordingly, we relieved the cable system of the rules requirements 'until such time as it appears that KRSD is providing a signal of acceptable quality. . . .' 2 FCC 2d at 466. It is now more than five years later, and the waiver is still in effect.
>
> "This fact, in conjunction with the continuity waiver (CATV), raises the fundamental issue of whether this licensee is technically qualified to remain a licensee of these stations." (Appendix B)

In doing so the Commission ignored the Petitioners' efforts which resulted in the alleviation of this difficulty, and as a result thereof, a request by CATV to withdraw its earlier request for a waiver of the rules and CATV's voluntary non-duplication agreement. (JA-269, 274-278)

Further, in 1966, Petitioners requested non-duplication protection because of an improved picture quality. *This petition was never acted on by the Commission.* (Appendix C–5c)

Due process requirements dictate that the decisions of the Commission must be sustained on substantial

evidence when viewed in the light that the record in its entirety furnishes. *Universal Camera Corp. v. National Labor Relations Board,* 340 U.S. 474, 456, 71 S.Ct. 456; *National Labor Relations Board v. Pittsburgh S.S. Co.,* 340 U.S. 498, 479, 71 S.Ct. 453.

IV.

THE COMMISSION'S FINDING THAT PETITIONERS HAD A DECADE OF SERIOUS TECHNICAL VIOLATIONS AND THAT SAID VIOLATIONS WERE CONTINUING IS WITHOUT SUBSTANTIAL SUPPORT IN THE RECORD.

There was no finding by the hearing examiner of the existence of any violations by Petitioners prior to 1966. (Appendix A) The technical violations cited by the F.C.C. Engineer since 1966 were either corrected or satisfactorily explained by the Petitioners to the F.C.C. Engineer (JA-50, 51). There was no evidence to base a finding that the broadcast picture was continuously defective. The mistaken inference drawn by the Commission on the CATV waiver is without support and, therefore, the finding of the Commission, that the violations were continuous, is without any basis in the record. The technical violation of the spurious signal was not continuous and was properly rebutted by an independent service company, RCA Co., which conducted tests and found no spurious signals (JA-71, BH Exhibit 6) and which was confirmed by the F.C.C. Engineers' inspection at KDSJ-TV in 1971. (JA-138, 139; 144, 146) The reliance on "continuous technical violations" is further evidenced by the Commission's failure to act upon and approve the Petitioners' applications for the construction permits of the new antenna and transmission line previously discussed.

There being no substantial evidence to support the Commission's decision that the technical violations had existed over a decade or in fact were continuous, renders the Commission's decision emasculated and without substantial evidence in support thereof, thus violating the Petitioners' rights without due process of law. *Universal Camera Corp. v. National Labor Relations Board, supra, National Labor Relations Board v. Pittsburgh S.S. Co., supra.*

CONCLUSION

A present FCC Commissioner, Nickolas Johnson, in this month's Yale Law Journal, Volume 82, pages 1575 et seq. "A Day in the Life: The Federal Communications Commission" observes that:

> "There is reason enough to assert that everything the FCC does is wrong." p. 1575

and reviews a typical weekly meeting to show the arbitrary and capricious manner in which the FCC conducts its decision-making process. He concludes his treatise with the statement the article will afford:

> ". . . the judicial branch some idea of how bad things really are, of how tenuous is the basis for the idea that judges should defer to the FCC's 'rational and orderly process.' Long-range reforms aside, if there is to be any immediate hope for the FCC, it lies with the courts." p. 1634

The Petitioners do not assert that everything that the Commission does is wrong; but they do assert that the Commission clearly was arbitrary and capricious in denying Petitioners a renewal of their licenses.

As Commissioner Johnson observes in his article, the Staff daily manipulates the Commission (page 1633) and this occurred in our case. The Commission repeatedly

relied on "violations" by petitioners claimed by the Staff Engineers and repeatedly refused to recognize petitioners' responses to those claimed violations.

The Court of Appeals erred when, in its traditional reluctance to overturn the decision of the FCC, it summarily affirmed the Commission's decision. Commissioner Johnson observes that the FCC tends to punish hardest the small broadcaster for violations of its rules. (p. 1625) The Commissioner's decisions involving these Petitioners is too harsh and is thereby arbitrary and capricious and should be reversed and a fair hearing given to the Petitioners' answers to the claimed violations.

Because this case presents questions of substantial and unique importance, and because the decisions of the Court of Appeals and the Commission deprive the Petitioners of rights without due process, and are in conflict with the decisions of this Court, it is submitted that this Petition should be granted and the record reviewed to reveal no substantial evidence that the Petitioners were inept, careless or unwilling to abide by the rules and regulations of the Federal Communications Commission.

Respectfully submitted,

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Attorney for Petitioners

Dated this 8th day of August, 1973.

APPENDIX A

F.C.C. 70D-28

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of ELI AND HARRY DANIELS, D.B.A. THE HEART OF THE BLACK HILLS STATIONS For Renewal of License of Station KRSD-TV, Rapid City, S. Dak.	Docket No. 18358 File No. BRCT-410
ELI AND HARRY DANIELS, D.B.A. THE HEART OF THE BLACK HILLS STATIONS For Renewal of License of Station KDSJ-TV, Lead, S. Dak.	Docket No. 18359 File No. BRCT-564

APPEARANCES

Stephen A. Gold, *Mark E. Fields*, and *Samuel Miller*, for The Heart of the Black Hills Stations; *Richard M. Riehl* and *Vergil W. Tacy*, for Chief, Broadcast Bureau, Federal Communications Commission.

INITIAL DECISION OF HEARING EXAMINER THOMAS H. DONAHUE

(Issued July 14, 1970; Released July 17, 1970)

PRELIMINARY STATEMENT

1. By Memorandum Opinion and Order released October 21, 1968, the Commission designated the captioned applications for hearing. These were the issues specified:

(1) To determine the nature and extent of the violations of the Commission Rules and Regulations by the licensees of Station KRSD-TV, Rapid City, South Dakota, as disclosed by Official Notices of Violation issued against that station on September 27, 1966 and October 24, 1967, by the station's responses thereto, and by related documents;

(2) To determine the nature and extent of the violation of Commission Rules and Regulations by the licensees of Station KDSJ-TV, Lead, South Dakota, as disclosed by Official Notices of Violation issued against that station on September 27, 1966 (corrected November 4, 1966) and October 24, 1967, by the station's responses thereto and by related documents;

(3) To determine whether the licensees' management and operation of Stations KRSD-TV and KDSJ-TV was so negligent, careless, or inept, or evidences such disregard for the Commission's Rules and Regulations, that they cannot be relied upon to fulfill the responsibilities imposed upon them; and

(4) To determine, in light of the evidence adduced under the foregoing issues, whether the licensees of Stations KRSD-TV and KDSJ-TV are qualified to receive renewals of these licenses and whether renewal of these licenses would serve the public interest.

The order directed the Broadcast Bureau to serve on the licensees a Bill of Particulars setting forth the facts upon which the issues were based. On October 28, 1968, this document was furnished.

2. A prehearing conference was held on November 27, 1968, in Washington. The matter was heard in Rapid City, South Dakota, on March 10–13, 1969, and in Washington, D.C., on April 17, 1969. On the latter date the record was closed. The record was reopened three times in Washington, on May 27, 1969, on November 25, 1969, and on January 15, 1970. Proposed findings were filed by the licensees and by the Broadcast Bureau on February 10, 1970. Reply findings were filed by both parties on March 3, 1970.

FINDINGS OF FACT

Some Background Data

3. Eli and Harry Daniels are equal partners in the captioned licensees. They have been operators of the licensed stations since 1957 (KRSD-TV) and 1959 (KDSJ-TV).

4. Eli Daniels oversees the day-to-day operations of both stations, including engineering. Engineering work normally performed by a consultant is performed by him. Born in 1911 in Wyoming he attended a radio and electronics school for one year. In 1932 he took a course in college algebra by correspondence from the University of Wyoming. While in the Army he took a course in engineering mathematics by correspondence from the University of Washington. In 1956 he attended the Capitol Radio Institute in Washington, D.C.

5. For a number of years Eli Daniels held an amateur license. In 1933 he received a first-class radiotelephone license and has held it ever since. In 1934 he built KWYO in Sheridan, Wyoming, and served there until 1939 as Chief Engineer. From 1939 to 1940 he owned and operated a radio repair shop. In 1940 he enlisted in the Army and served as a radio technician with the Alaska Communications Commission. He was discharged from the Army in 1945. Shortly thereafter, he, his brother, and his father obtained a construction permit for a radio station in Deadwood, South Dakota. They built the station themselves and it went on the air as KDSJ (AM) in 1947. In 1953 the same group built KRSD (AM), Rapid City. In 1957 they built KRSD-TV in Rapid City and in 1959 KDSJ-TV in Lead.[1] In 1958 they received a construction permit for an inter-city private relay link, thereby bringing live television network programming to the Black Hills for the first time. Since 1960 Eli and Harry Daniels have been the licensees and have operated the two television stations. They have received a number of public service commendations for their stations' services to such organizations as the Rapid City Chamber of Commerce, United States Army, United States Air Force, Rapid City Jaycees, Salvation Army, and the United States Post Office.

[1] Lead and Deadwood are adjoining towns.

6. Harry Daniels handles the financial affairs of the stations. Those affairs are not very good. The market in which the stations operate is listed by the American Research Bureau as 183rd in the nation. In Rapid City there are another commercial television station and a non-commercial educational station. In both Lead and Rapid City cable systems furnish subscribers with imported television service. The wives of both partners are employed outside the stations. Excluding allowance for depreciation, both stations lose money. At the time of the hearing the two partners were each taking out of the two stations' operations about $300 a month in salary.

KRSD-TV—Notices of Violations and Responses 1966-1967

7. In September 1966 KRSD-TV was inspected by two Commission engineers, John McKinney, Engineer in Charge, Central TV Monitoring Bureau at Grand Island, Nebraska, and Donald E. Wyatt of the Denver Field Office. Following the inspection, on September 27, 1966, each engineer sent the station an Official Notice of Violation (FCC Form 793-A). Specific violations cited in the McKinney notice read as follows:

Non-compliance with F.C.C. Rules and Regulations as follows:
1. Section 73.668(b). Visual to aural frequency separation unsteady and measured as 4501.110 in one instance.
2. Section 73.682(a) (13) & (17). Reference white level and set-up level not maintained within prescribed limits.
3. Section 73.682(a)(15). Aural radiated power as measured by the mobile monitoring unit was approximately equal to the visual radiated power.
4. Section 73.687(a)(2). With full sweep applied to the KRSD-TV visual transmitter variations as great as 7 db in amplitude were observed between the 2.1 and 4.1 Mc/s portions of the radiated signal.
5. Section 73.687(a)(3). Visual carrier minus the color subcarrier frequency (−3.58) measured −35 db.
6. Section 73.699, Fig. 6. Color burst amplitude measured at not more than 20% of sync.

Those cited in the Wyatt notice read:

Non-compliance with the Commission's Rules Governing Radio Broadcast Services as follows:
1. Section 73.639(b)(6) in that authority to operate with the substitute aural exciter in the aural transmitter was not available. Telegraphic authority to operate with the substitute aural exciter expired August 6, 1966.
2. Section 73.689(b)(3) in that the station has operated with visual output power less than 80 percent of the authorized power in excess of 10 days without prior Commission authority. The station has operated with visual output power less than 80 percent of the authorized power since August 6, 1966.
3. Section 73.669(a) in that a maintenance log as required by Section 73.672 has not been maintained.
4. Section 73.672(a)(5) in that there was no record available showing that the tower lights and tower light controls have been inspected pursuant to Section 17.38(d) with the results entered in the maintenance log.
5. Section 73.672(a)(6) in that there was no record available showing that the calibration of the visual and aural power meters has been accomplished in accordance with Section 73.689. The results of this calibration are to be entered in the maintenance log.
6. Section 73.672(a)(3)(ii) in that there was no record available showing that the monthly frequency measurement has been accomplished in accordance with Section 73.690. The results of this measurement to be made in the maintenance log.

7. Section 73.661 in that the original operator license (or FCC Form 759) of the operator, Frank T. Etherington (on duty from 7:00 AM through 3:00 PM on September 14, 1966) was not posted. (Only a photocopy of the license was posted.)

8. Section 73.689(b)(2) in that the aural transmitter output power has been in excess of 110 percent of the authorized power as specified by Section 73.682(a)(15) since March 1, 1966.

8. On October 15, 1966, Eli Daniels responded to both notices. His response to the McKinney notice reads:

Reference: Violation notice by John McKinney, Engineer In Charge, dated Sept. 27, 1966. Notice received on Sept. 30, 1966. FCC office in Denver (Mr. George) was called for an extension of time in which to answer.

Violation #1: We were operating with a substitute aural exciter because repairs were being made on the regular one. Authority was obtained from the Commission to use a substitute. The regular unit has since been installed, however we are getting some drifting with temperature changes.

Violation #2: This is a condition that whenever we are using the network we cannot control the set-up. We can control the white level and we are watching this more closely. We are looking into the possibility of using a local sync generator locked to the net to correct the set-up portion of this violation.

Violation #3: Our aural transmitter was being operated according to Section 73.682(a)(15) as amended eff. 5-11-64; III(64)-1; which calls for a range of power between 10 & 70 percent of the visual transmitter power. Our visual was operating at reduced power, due to weak tubes (4X500's) in the IPA stage. This violation has been corrected in that we have reduced our aural power to operate in the range between 10 & 20 percent of our visual transmitter power as advised by the inspector.

Note: Transmittal sheets to up-date my copy of the FCC rules have not been received. I have written the GPO several times during the last year and a half to correct this situation and it appears that I'm finally getting results.

Violation #4: This condition was caused by a faulty transmission line which has been causing the station trouble for several months. The condition was caused by a faulty center-conductor-connector in the transmission line. It was intermittent and varied with the wind. This in turn caused standing waves as shown by the sweep response. After many hours of tower work the bad connector was located and repaired. It was located at the 350 foot level. Please refer to the May 11, 66 Transmitter & Maintenance log sheet; (see reverse side for maintenance details). The condition has been corrected.

Violation #5: Inspection of the minus 3.58 notch filter showed it to be tuned properly. No doubt this discrepancy was caused by reflection on the transmission lines as explained above.

Violation #6: Color burst amplitude will vary from program to program which we receive from our network feed; (we have no local color). This condition cannot be corrected for the time being because we are receiving our signal off-the-air from KFYR-TV, Bismarck, N.D. which in turn is off-the-air from WDAY-TV, Fargo, N.D. and which in turn is off-the-air from KSPT-TV, Minneapolis, Minn.

His response to the Wyatt notice included as attachments 12 pages of copies of transmitter operating and maintenance logs. The response, itself, reads:

Reference Violation notice by Donald E. Wyatt, Issuing Officer, dated September 27, 1966, received September 30, 1966.

Violation #1: Authority to operate with a substitute aural exciter was attached to the unit in the transmitter. This telegraphic authority from the FCC in Washington, D.C. was handed to the inspector by my operator, Mr. Tom Hoffman. It was the only instrument of authority received from the FCC. It had expired and through a mistake of identity, I had had another telegraphic authority which was dated to expire on September 16, 1966, which I

mistook for the more recent authority mentioned above. The repaired regular unit has been installed.

Violation #2: The output meter on the transmitter is a peak reading device and when everything is working normally it is set-up to read 507 volts for 5 kw peak power. The low readings as noted by the inspector (around 350) did not indicate true output power because of the condition of the transmission lines, (ie. faulty lines *through no fault of our own*). Since the reflections on the lines were causing standing waves the peak reading device will read differently depending on where it is installed in the line. Under the above conditions, the most accurate method of measuring power was by the indirect method. For further information on the condition of the line please refer to the May 11, 66 maintenance entries on the reverse side of the sheet: attached. When the transmitter was operating into a dummy load and/or into normal transmission conditions, the transmitter delivered 3kw average power with a plate voltage of 3.5kv and 1.9 amperes of plate current the efficiency factor is 45% (the manufacturer rated the transmitter at near 50%). Whereas we were operating with an input of 3.65 kilovolts and 1.5 amperes current into the final amplifier. This is 5.475 input power and at 45% efficiency this is 2.46 kw or 82% of 3kw average.

Violation #3: I believe that we kept a pretty good account of our maintenance as required by 73.669(a). Our maintenance log is incorporated with our transmitter log since the latter is maintained daily and whenever any maintenance information is logged it is added to the transmitter operating sheet. Please refer to the attached Xerox copies of our logs dated May 11, May 13, May 16, June 27, June 28, July 21 and August 25, all 1966, for maintenance entries.

Violation #4: Section 73.672(a)(5) does not appear in my copy of the rules. Page 212. (ED.1/64) of my rule book has 73.672(e) which states a record must be made of tower light inspection. Please refer to Transmitter & Maintenance log sheet dated August 25/66. We also did tower work which included lighting inspection on June 27 and 28th as noted on the logs.

Violation #5: 73.672(a)(6) does not appear in my copy of the rules. However please refer to T & M log sheet dated May 16, 1966, reverse side. Calibration was performed and noted, however it does not state results, other than normal. The procedure is to set-up the output meter to read numerally the peak power output.

Violation #6: Section 73.672(a)(3)(ii) does not appear in my rule book. Section 73.690(b)(3) when operating without a frequency monitor etc. and (c) of same section refers to logging results. Since we have been working with a recently repaired monitor, we have not had the occasion to check frequencies as often as once a month. Therefore logging was not done.

Violation #7: This has been corrected.

Violation #8: Section 73.689(b)(2) states that power is to be 80 to 110% of authorized power. And Section 73.682(a)(15) does not appear in my rule book, however the inspector informed me that the authorized power is between 10 and 20 percent of the visual power. This condition has been complied with.

Please note: An extensive effort has been made during the last year and one half to obtain transmittal sheets to up-date my copy of the rules. Finally this last week, I seem to be getting results from the C.S.S. subscription Unit, P.O. 1533 Wash. D.C.

On the same date, October 15, 1966, Daniels sent notices to both the FCC Denver and Washington offices that: (1) KRSD-TV had reinstalled its regular aural exciter; (2) the station would operate temporarily with reduced power so that transmission lines could be repaired.

9. On October 3, 1967, McKinney again inspected KRSD-TV. Following this inspection, on October 24, 1967, a Notice of Violation was sent the station. Specific violations cited read as follows:

Non-compliance with F.C.C. Rules and Regulations as follows:

1. Section 17.56. Tower lighting has not been repaired as soon as practicable. October 2, 1967—Entry in operating log shows that "Top (beacon) light and two

104-015—71——3

lower lights out" Signed, "Huffman". This same entry appears back to September 8, 1967. On September 8, 1967, an entry by Eli Daniels (watchstander) indicates "OK" for all lights. On September 7, 1967, an entry says "2 lower lights and top light out—notified control tower", signed Jerry Villone. Entries from 6/25/67 to 9/6/67 indicate two lower lights out. Entries from 5/3/67 to 6/26/67 indicate one lower light out. No entries in log show that any lights were replaced during this period of time.

2. Section 73.680(a). Maintenance logs are not maintained. Licensee represents that maintenance logs are made a part of operating logs by logging necessary information in Remarks Column of operating log, however, sufficient entries could not be found to substantiate this claim.

3. Section 73.672(a)(3). Monthly frequency measurements not logged.

4. Section 73.672(a)(5). Quarterly inspection of tower lighting apparatus not logged.

5. Section 73.672(a)(6). There are practically no entries indicating that transmitter maintenance is performed.

6. Section 73.689(b)(1). Visual power not maintained within the range of 80% to 110% of authorized power. Output meter for visual amplifier has full scale reading of 750 R.F. Volts. If 500 volts on meter equalled 5000 watt output authorized licensee and meter was linear, then 400 on meter would represent 80% of authorized power. During inspection meter read 368 volts. Inspection of operating logs showed the following representative readings: 7/19/67—450 volts (highest reading found); 7/20/67—375 volts; 8/1/67—310 volts; 8/6/67—250 volts; 8/22/67—215 volts; 8/26/67—230 volts.

(Above readings are average readings for days shown; other readings on same days might vary 10 or 15 volts from reading shown.)

Section 73.689(b)(1). Evidence that the output meter(s) has been calibrated at six months intervals was not readily available. A pencilled notation in the Remarks Column of the station's operating log for October 2, 1967 reads: "Output calibrated this date. E.D." No explanation of the method employed to calibrate the output nor the voltmeter readings obtained was supplied, furthermore, the entry did not state whether the visual or aural transmitter was so calibrated. Inspection of these same logs back through a six-months period failed to show that the output had been calibrated at the necessary six months intervals.

7. Section 73.689(b)(2). Aural power not maintained within range of 80% to 100% of authorized power. Output meter for aural amplifier same as that of visual amplifier and has full scale reading of 750 R.F. volts. Meter read 150 volts at time of inspection but inspection of operating logs showed the following representative readings: 8/19/67—230 volts; 8/20/67—200 volts; 8/21/67—100 volts; 8/22/67—230 volts.

After date of 8/22/67 the logs show a gradual decline in aural output readings to the present reading of 150 volts.

8. Section 73.687(e). Wiring and shielding not in accordance with accepted standards of good engineering practice.

9. Section 73.682(a) (13) & (17). Reference white level and set-up level not maintained within prescribed limits.

10. Section 73.687(a)(2). Visual transmitter response does not meet the requirements of this part.

11. Section 73.699, Fig. 6(5). Color burst amplitude measured at only 8% of sync level.

10. On October 24, 1967, McKinney also sent KRSD-TV an Advisory Notice (FCC Form 790). That notice warned the station that unless action was immediately taken to correct unsatisfactory conditions a Notice of Violation would issue. The unsatisfactory conditions noted by McKinney were as follows:

Authority for reduced aural power stating present aural operating power of transmitter not posted.

Color monitor inoperative.

Blanking level measured 80 percent.

Noise present on network video feed ofttimes accompanied by sound bars.

11. Response to the October 24, 1967 McKinney Notice of Violation was made by Eli Daniels on November 6, 1967. Attached to the letter are three pictures of response curves of the KRSD-TV transmitter taken on November 5, 1967. The body of Daniels' letter reads:

Reply to Violations:

1. Reference tower lighting discrepancies; please be informed that the top light was installed as soon as practical. The tower maintenance man happened to be out of town fighting fire in Idaho. He installed the top tower as soon as he got back. FAA was notified of the outage. The fact that Hoffman read the top light out on one day, and I noted it on the next day, is correct. My assumption is that we had a broken loose filament. Furthermore, the fact that 2 lower tower lights out as indicated is correct, this condition may have existed for quite some time, however, please be informed that the lower lighting still meets the requirements as stated on the station license, since we have three lights installed at each lower level, and therefore when one is out at each lower level, we are still within the requirements, of two lights at each of the lower levels.

2. Maintenance logs were maintained. The log book is kept in a compartment slot shelf behind the transmitter. The operator on duty at the time of inspection had only been working for about five days and apparently he was not familiar with the maintenance log. Routine maintenance, such as tube replacements and terminal equipment repair etc.; and logging required by Sec. 73.669(a) is kept in the remarks margin of the daily operating log. The separate maintenance log is instituted in Nov. 1966 per instructions of a mailing from the FCC. Docket No. 16005 in the matter of amendment of part 73 which explains the requirements relating to logs.

3. Monthly frequency measurements logged in above mentioned maintenance log book.

4. Quarterly inspection logging entries in above mentioned maintenance log book.

5. Transmitter maintenance records are kept in the first section of the maintenance log if the maintenance is of major importance such as tune-up, major break downs and minor repairs are noted in the operators logs.

6. Visual power not maintained within the range of 80% to 110% of authorized power. This has been a battle with this Dumont transmitter. Usually, 5 k.w. is not available from this transmitter even with new tubes, if the conditions required for color bandwidth is met. The best I've been able to do is 4.25 kw to 4.5 kw into the dummy load. Our calibration was set so that we got below 350 on our output meter we were below power and efforts were instituted to bring it back up within ten days. The weakness of the transmitter seems to be in the 4 x 500 IPA stage which drives the finals. We have been working on a new drive stage to replace it, in order to get up to full power.

Section 73.689(b)(1) complied with and logged in section D of our maintenance log book.

7. Aural power output controlled by varying the drive into the finals. The finals were designed for maximum efficiency at an output of 2.5 KW. We have reduced drive to the final to meet the requirements of 73.689(b)(2). The output was set to an output of 800 watts into the dummy load, with the output meter reading approximately 210. The aural transmitter easily meets the present requirements, however, by reducing drive to the final, the efficiency sometimes goes as low as 15%. It is intended to apply for permission to eliminate the finals (3 x 2500 A 3's) and supply power into the antenna from a lower power IPA stage.

8. Wiring and shielding. This discrepancy, is not very explicit. I don't know whether it's in reference to the transmitter or the terminal equipment. However, I would like to mention that all the video circuits in the terminal equipment are well shielded and run with co-axial cable throughout. We have taken great pains to do this because we have had a ground potential difference between the studio and the transmitter site (which is interconnected by co-axial cable) which has caused an ac hum induction into our local video circuits.

Wiring of the transmitter, has not been changed materially from that of the manufacturer.

9. Reference white level and set-up level not maintained within prescribed limits. This violation is a human element type. Switchers and operators have been instructed to watch this closely. The network incoming signal often times has a low black level set-up which we cannot do anything with at the present time.

10. Visual transmitter response does not meet the requirements of Section 73.687(a)(2).

Figures 1, 2 & 3, attached shows the response curve of the transmitter as taken on November 5, 1967. Peak power was 4150 watts.

The response is ruined when the transmitter is connected to the transmission lines. Reflections are caused by a faulty antenna. Preparations are underway to replace the antenna, since it was damaged during a severe wind storm some time ago.

11. Color burst amplitude comes into our control terminal at varying levels, however generally it is within prescribed limits.

12. On November 8, 1967, McKinney sent KRSD-TV a "Warning" (FCC Form 794). The document repeated the specification of violations covered by the Notice of Violation sent on October 24, 1967 and pointed out penalties assessable for failure to make response to notices of violations.

KDSJ-TV—Notices of Violations and Responses 1966-1967

13. On September 16, 1966, KDSJ-TV was inspected by John McKinney and Donald Wyatt. Following the inspection each sent KDSJ-TV Notices of Violations. Specific violations cited in the McKinney notice read as follows:

Non-compliance with F.C.C. Rules and Regulations as follows:

1. Sections 73.687(a)(2); 73.687(a)(3); 73.687(a)(6); 73.699 Fig. 5 and 73.687(1)(1).

Measurements by the Central TV mobile monitoring unit indicated that KDSJ-TV was transmitting both an upper and lower sideband with spurious mixtures present 9 Mc/s either side of the visual carrier frequency. For example:

Aural+4.5 Mc/s=−25 db (as referred to the visual carrier)
Visual−4.5 Mc/s=−20 db (as referred to the visual carrier)
Visual−3.58 Mc/s=−25 db (as referred to the visual carrier)
Visual−9 Mc/s=−25 db (as referred to the visual carrier)

Numerous other spurious products were noted throughout this region all less than 40 db suppressed.

2. Section 73.668(a). KDSJ-TV was operating with a visual carrier frequency beyond tolerance as indicated above.

3. Section 73.682(a) (13) & (17). Reference white level and set-up level not maintained.

4. Section 73.682(a)(16). Peak to peak variation exceeded 5%.

5. Section 73.699, Figure 6. Horizontal synchronizing pulses so badly distorted as to be unmeasurable. Front porch non-existent, back porch degraded.

6. Section 73.699, Figure 6. Color burst measured as less than 20 percent of sync.

In addition to the above, the video noise present in the transmitted signal from KDSJ-TV was extremely high.

14. On September 16, 1966, KDSJ-TV was also inspected by Donald Wyatt. Specific violations cited in Wyatt's Notice of Violation (which was mailed to KDSJ-TV on September 27, 1966) read as follows:

Non-compliance with the Commission's Rules Governing Radio Broadcast Services as follows:

1. Section 73.689(b)(2) in that the aural transmitter output power has been in excess of 110 percent of the authorized power as specified by Section 73.682(a)(15) since March 1, 1966.

2. Section 73.669(a) in that a maintenance log as required by Section 73.672 has not been maintained.

3. Section 73.671(a)(5) in that entries required by this section have not always been made in the operating log. The station was entered at 1:30 PM MST on September 14, 1966, and it was observed that no entries had been made in the operating log since 12:30 PM MST on this date.

4. Section 73.672(a)(6) in that there was no record available showing that the calibration of the visual and aural power meters has been accomplished in accordance with Section 73.689. The results of this calibration are to be entered in the maintenance log.

5. Section 73.672(a)(5) in that there was no record available showing that the tower lights and tower light controls have been inspected pursuant to Section 17.38(d) with the results entered in the maintenance log.

6. Section 73.672(a)(3)(ii) in that there was no record available showing that the monthly frequency measurement has been accomplished in accordance with Section 73.690. The results of these measurements are to be entered in the maintenance logs.

7. Section 73.691(a) in that the peak indicating flasher on the aural modulation monitor was inoperative.

15. On October 17, 1966, the Acting Engineer in Charge of the Denver Field Office sent KDSJ-TV a "Warning". This document followed standard form and substance of such documents, see e.g. paragraph 12, above.

16. On October 19, 1966, Eli Daniels responded to both notices of violations. His response to the McKinney notice reads:

Reference to official NOTICE OF VIOLATION dated September 16, 1966 and WARNING NOTICE of September 27, 1966, please be informed that delay in response was beyond my control. We have had technical difficulties on transmission lines at our station in Rapid City and check-up at KDSJ-TV regarding VIOLATION NOTICES have not been completed. This letter will serve as a reply to some of the violations, and additional information will be forth-coming.

VIOLATION #1—Sections (etc.)

I BELIEVE THAT MUCH OF THE INTERFERENCE MEASURED ABOVE AND BELOW OUR CHANNEL FIVE BAND IS INTERFERENCE FROM THE MULTITUDE OF TWO-WAY RADIO INSTALLED ON NEAR-BY TERRY PEAK.

Please refer to my correspondence to your office on the problem of interference on Channel 7 at Terry Peak (which we in turn relay by micro-wave to our channel 5 transmitter site.) Channel 5 also has interference from these two-way radios.

On September 18, 1966 I made a preliminary check on the KDSJ-TV transmitter. The upper side band was down about 2 db at 4 mcs. from that shown on the exhibit below.

SET FORTH IS A PICTURE OF AN OSCILLOSCOPE READING

The above presentation is the results of the side band response after a slight touch up of the transmitter. Time did not permit a more extensive check on this date.

VIOLATION #2

On October 18, 1966 the frequency was measured with a Gertch T 1020 A FREQUENCY METER and found to be 1105 cycles above our assigned frequency of 77.240 mcs. It was adjusted to zero, hence violation #2 is corrected and section 73.668(a) complied with.

Please note: Your discrepancy report indicates that the frequency was measured at 72.241.501 mcs as against the assigned frequency of 72.240 mcs. I believe the second digit is a misprint.

VIOLATION #3—73.682(a) (13) and (17)

Reference white level and black level (set-up) is a problem which varies mostly on our network feed, although we do have this problem on local programming. We are working to improve this situation.

VIOLATION #4—73.682(a) (16)

PEAK TO PEAK VARIATION exceeded 5% because, the operator informs me, the transmitter video clamping circuits were in-operative. We are working to restore the clamp circuits to normal.

VIOLATION #5—Sec. 73.699, fig. 6

FAULTY SYNC-PULSES due to lack of clamping in transmitter as mentioned above in #4. This will be corrected as soon as the clamp circuit is repaired. Trouble shooting on this circuit is being done now. Front-porch is always bad from our network feed. Project is under-way to correct this. Clamping restoration should cure the back porch problem.

VIOLATION #6—73.699, fig. 6

Color burst comes in low in amplitude from the network feed. This problem will be with us until we change our network feed pick-up.

A high level of noise and man made interference in our video signal is due to interference from the local two-way radio. This fact has been confirmed by tests made with Electro-Craft, a local two-way radio service company. I had them key their two-way radios and interference came in simultaneously with their transmissions. They have three transmitters which they key on simultaneously: one frequency is very near the lower edge of Channel 7, our pick up channel.

His response to the Wyatt notice reads:

Reference OFFICIAL NOTICE, dated September 16, 1966 by issuing officer, Donald E. Wyatt:

VIOLATION #1—Section 73.689(b) (2) and 73.682(a) (15)

These sections complied with. The power of the aural transmitter was reduced to 100 watts output.

VIOLATION #2—Section 73.669(a)

It is a practice here to incorporate our maintenance logging with our transmitter log. For instance, whenever the transmitter goes off the air for maintenance, or unpredicted outages, the on and off times are recorded on the transmitter log along with the maintenance requirements. After all, a transmitter log is primarily for the purpose of providing proper maintenance.

VIOLATION #3—Section 73.671(a) (3)

Mr. Roy Hicks, operator on duty, reported that his log was up to date and that the station was entered at 12:30 PM his time. He said that subsequent readings were not kept up only during the time the inspectors were there, because they had the log in their possession. Our operators are instructed to keep up with the log.

VIOLATION #4—Section 73.672(a) (6)

Complied with.

VIOLATION #5—Section 73.672(a) (5)

TOWER LIGHTS INSPECTED AND LOGGED ACCORDING TO THIS SECTION.

VIOLATION #6—Section 73.672(a) (3) (ii)

Monthly frequency measurement made and logged according to this section.

VIOLATION #7—Section 73.691(a)

PEAK INDICATOR BEING REPAIRED. This section will be complied with shortly.

17. On November 4, 1966, the Engineer in Charge of the Denver Field Office wrote Daniels a letter covering enclosure of corrected copies of the Wyatt notice of violations and a corrected "warning".

On the corrected notice, change was made in a date specified in one of the items. Request also was made in the covering letter that the office be promptly advised if corrected response to the corrected notice was contemplated. Request was further made that the office be notified if the peak indicating flasher on the aural modulation monitor was functioning properly.

18. On October 3, 1967, KDSJ–TV was again inspected by McKinney. Following the inspection, on October 24, 1967, two Official Notices of Violation were sent KDSJ–TV. Specific violations cited in one included the following:

Non-compliance with F.C.C. Rules and Regulations as follows:

1. Section 17.47(a)(1). (old Section 17.38(b)). Daily visual inspection of tower lighting not entered in station records August 4 and August 30, 1967.

2. Section 17.50. Tower painting is badly deteriorated impairing visibility.

3. Section 17.56. According to operating log entries the obstruction lights on the tower have been inoperative since April 30 1967.

4. Section 73.668(b). Aural to visual frequency separation was measured 4498.950 at 5:20 PM MDT.

5. Section 73.669(a). Maintenance logs were not maintained. Licensee represents that maintenance logs are made a part of operating logs by logging maintenance information in Remarks Column of operating log. Sufficient entries could not be found to substantiate this claim.

6. Section 73.669(b). Operating log does not indicate time zone used at station.

7. Section 73.671(a)(2). Numerous periods of station outage appear in operating log without proper explanation for same. For example, on August 30, 1967, operator signed on duty at 6:45 AM but there are no log entries from 7:00 AM through 10:30 AM. Additionally, on August 11, 12, and 24, similar blank spaces appear in operating logs without cause for interruption shown. Many of these are in middle of program day and last for two to three hours.

8. Section 73.672(a)(3). Monthly frequency measurements not logged. Checked logs back through February 1967.

9. Section 73.672(b). Entry for quarterly tower lighting check not signed or dated.

10. Section 73.682(a)(17). No set-up present on network programming.

11. Sections 73.687(a)(2), 73.687(a)(3), 73.687(a)(6), 73.687(i)(1) and 73.699 Fig 5. Measurements indicated that KDSJ–TV was transmitting a double sideband signal with spurious signals above and below the visual carrier, for example: Visual minus 4.5 Mc/s=−20 db; Visual minus 3.58=−30 db; Visual minus 9.0 Mc/s=−35 db; Aural plus 4.5 Mc/s=−20 db (all as referred to visual carrier). Numerous spurious products less than 40 db suppressed were noted in the region between minus 9 Mc/s and plus 9 Mc/s of the visual carrier.

12. Section 73.687(b)(7). Aural modulation was measured with peaks not greater than 50 percent for a continuous period of one half hour. (One third of this modulation level could be attributed to ambient noise and hiss rather than program content).

13. Section 73.687 (c)(4) and (d)(3). Transmitter was being operated with portions of front panelling removed exposing high voltage power supply to touch by operating personnel. This was obviously done to provide additional cooling for the transmitter as an external fan was placed before this opening and directed into the transmitter.

14. Section 73.687(e). Wiring and shielding not in accordance with accepted standards of good engineering practice.

15. Section 73.689(b). Station records checked back through February and no record of output power meter calibration found.

16. Section 73.691(a). The visual waveform monitor (Heathkit scope) was not triggering properly and a suitable wave form presentation could not be obtained for proper adjustment of video levels. Color receiver/monitor was not operative.

17. Section 73.699 Fig 6(5). Color burst amplitude measured approximately 5 percent of sync. Chrominance modulation on waveform practically non-existent.

18. Section 73.933(a). Emergency Broadcast Receiver would not trigger alarm device.

Specific violations cited in the other Notice of Violation read as follows:

1. Section 73.669(a) Operator Harold W. Codner (P1-15-5733) had not signed log when starting duty at 3:00 PM MDT.
2. Section 73.671(a)(3). Operator Harold W. Codner had not made required half hourly entries from 3:00 PM until 4:30 PM (time of entry by inspector).

19. On November 8, 1967, a Warning was sent KDSJ-TV in respect to the violations cited in the second October 24, 1967 Notice of Violations.

20. Separate responses were made to the first and second Notices of Violations by Eli Daniels on November 10, 1967. Response to the first notice reads as follows:

Non Compliance with FCC Rules and Regulations:

Violation 1 Thru 18

1. Mr. Roy Hicks, Supervisor, has informed the operator of this violation and was assured that effort will be made to prevent repetition.
2. Agreement has been made with a painter to paint the tower as soon as possible.
3. Complete tower lighting, inspection and repaired as of 10-9-67. Management at KDSJ-TV was not informed that the lights were in-operative since April 30, 1967.
4. Aural to Visual frequency separation has been adjusted by frequency measurement.
5. Mr. Roy Hicks Maintenance Supervisor informs me that as of June of this year the maintenance log was kept in a note book which was kept in the files at the transmitter station.
6. Supervisor has been informed and correct measures have been instituted.
7. The first log in question was August 22, 1967. . . . not August 30. The operator had signed on duty then was informed by KRSD-TV in Rapid City, our program source, that transmission would be late in starting. The operator remained on duty. When transmission resumed, logging was continued.

The other log entries mentioned were for similar reasons and/or KRSD-TV not on the air, or outage of microwave between KRSD and KDSJ. When transmission was resumed, logging was resumed.

8. Monthly frequency measurements were made, however, logging was not kept up. This situation will be corrected.
9. [Illegible on record copy.]
10. Efforts are being made to correct this discrepancy.
11. Measurements were made on KDSJ-TV transmitter on November 8, 1967. Photographs were taken of the tektronic type 524 AD scope. The attached figures 1, 2 and 3 are the results of pictures taken. Figure 1 shows an overall curve with 20 DB down at —1.25 MCS. Figure 2 shows response above the carrier out to 10 MCS. Figure 3 shows the response below the carrier out to 10 MCS.

Complete measurements were made to check the requirements of the sections mentioned in violation 11, however in the developing process the negatives were ruined.

It is my contention that most of the spurious products adjacent to Channel 5 at Lead are caused by the two way installations at Terry Peak. Whenever we have had too much lower side band, we have been informed of interferring with the two way communications by the operators thereof. This has happened infrequently; perhaps about 2 or 3 times during the last four years. Furthermore, the C.A.T.V. System at Lead is another source of spurious emissions which we have noted as causing interference adjacent to Channel 5.

Further measurements and corrective adjustments and repairs will be made within two weeks. The results will be recorded and forwarded for further reply to this violation.

12. Supervisor. Mr. Hicks informs that the aural modulation indicator flasher had been flashing quite often as the operator turned level down to decrease number of flashes per minute and apparently it was turned too low. Corrective measures have been instituted.

13. The portions of the front paneling which were removed were the color filter and its power supply for maintenance. These units have been replaced. The fan is to cool the modulator power supply tubes mounted on the front panel of the cabinets.

14. Wiring and shielding as far as I'm concerned are according to standards and practices which I have observed at other stations. If any wiring and shielding was noted by the inspector as not according to accepted standards of good engineering practices then I think it's proper to request a more detailed and specific explanation on this matter so that I will be able to evaluate the situation better.

15. Out put power meter calibrations are usually performed by maintenance men from KRSD TV in Rapid City. Notation in the stations maintenance log were not always made due to the fact that notes weren't made available to Roy Hicks, the Maintenance Supervisor, at Deadwood. Corrective measures to avoid violations of this sort have been taken.

16. Measures have been taken to correct this discrepancy.

17. Color burst amplitudes will vary on the network signals. There are many variables that causes loss of color burst. Generally the incoming micro wave is fairly decent, however due to a large amount of interference, at Terry Peak, in the reception of Channel 7 (the program source for KDSJ-TV) we have had to install filters, above and below the Channel 7 band. Also the receiver has to be tuned to eliminate two way hetrodyne. This all causes degradation of the signal. This interference to the reception of Channel 7 at Terry Peak was noted in a letter dated March 2, 1966 to the FCC office in Denver, Colorado. Tests were made to confirm some of these sources of interference.

18. According to Roy Hicks, supervisor, the Emergency Broadcasting Receiver is operating properly and was on the day of the inspection. The operator on duty reported the alarm rang when KOTA, the monitored station, changed to night time pattern on the day of the inspection. We found no fault with the operation of the receiver.

Response to the second notice reads:

Violation of FCC Rules Section 73.669(a) and Section 73.671(a)(3).

Operator Harold W. Codner has been informed of the violations by his supervisor, Mr. Roy Hicks and he has assured Mr. Hicks that he will make every effort to comply with the rules.

Testimony of Some Witnesses

21. In addition to the chief protagonists, Eli Daniels, licensees' principal, and John McKinney, Engineer in Charge of the Commission's monitoring station in Grand Island, Nebraska, a number of witnesses took the stand at the hearing in Rapid City. In the main, the facts testified to by these witnesses have only peripheral bearing on the issues. Brief digests of their testimony are set forth below.

Donald Eugene Wyatt

22. Wyatt is the Commission engineer referred to in Paragraph 7, above. On direct examination he testified in amplification of the various violations he found at KRSD-TV and KDSJ-TV during his September 1966 inspection of those stations. Extensive cross-examination of the witness failed to impeach his account of the violations he found at KRSD-TV and KDSJ-TV. Wyatt did testify that he found Eli Daniels cooperative. He also testified that out of 40 stations he had inspected KRSD-TV and KDSJ-TV were the poorest he had found in the entire district. On the basis of "good," "fair," "poor" and "very poor" criteria, he rated the two stations "very poor".

Charles T. Undlin

23. He is president of the First National Bank of the Black Hills and president of the Rapid City Chamber of Commerce. He has lived in Rapid City nine years. Over the years he has sometimes had difficulty in trying to watch the picture on KRSD–TV. He has also heard unfavorable comments from others concerning reception of some of KRSD–TV's programs, particularly sports programs. Although he is not a "major television watcher", he has the impression that KRSD–TV's picture recently has been better than it was some years ago. He does not employ a roof top antenna.

H. P. Dixon

24. He is assistant vice president of the First National Bank of the Black Hills and director of advertising, marketing and public relations. He has held the latter position for nine years. He is a member of a number of civic organizations. The bank advertises over KRSD–TV. He watches that station some and finds its picture unstable. He has heard the same complaint from other people. Although not an avid television viewer, he has noticed some slight improvement in the KRSD–TV picture recently. He places most of the bank's business with the other Rapid City television station because it furnishes a better picture and better coverage. He has complained to KRSD–TV salesmen over the difficulty he has had in viewing that station's picture over the last six to eight years. He, too, does not employ an outdoor antenna with his set.

B. H. Dail

25. He sells electronic equipment, including television sets, in Rapid City. He has lived there 15 years. In his judgment from 1956 to the fall of 1968 the picture on KRSD–TV was very poor, difficult to watch, sound entering picture, some "tearing" and intermittent interruptions of service. Since the fall of 1968 there has been improvement. Sometime prior to August 1967 Dail placed a petition in a conspicuous place in his store. The petition was addressed to the FCC and to the National Broadcasting Company. It asked that steps be taken to improve the quality of the signal over KRSD–TV and KDSJ–TV. The petition asserted: (1) the quality of the signal transmitted by the two stations made viewing them annoying and unsatisfactory; (2) because of this problem the viewing public in the area was being deprived of NBC programs. Dail acquired over 2,000 signatures to the petition. The petition was sent to the Commission in Washington.

26. Dail did not mention the petition to Daniels. Sometime after the filing of the petition Daniels brought a successful suit in court against Dail for nonpayment of an advertising account. Dail was disappointed that Daniels didn't carry color broadcasting earlier than his stations did. Dail has sold Daniels merchandise and has had difficulty in making collection.

Donald William Holloway

27. He is a shipping clerk with a local concern. He has lived in and around Rapid City for some 28 years. Generally he has had no

trouble with KRSD TV although he has lived both in Rapid City and some five miles outside the city. However, at the time he took the stand he was getting a bad picture from both KRSD-TV and the other Rapid City TV station. In his opinion KRSD-TV broadcast much better color than the other Rapid City television station. The reason he believes he was getting bad television pictures was because an amateur operator was located next door. His set does not have an outside antenna.

Kenneth J. Kies

28. He is a life insurance agent. He is on the Rapid City City Council, acts as vice-mayor, belongs to the Chamber of Commerce and to the Lions Club. He has lived in Rapid City nearly 30 years. In comparison to other stations he has had difficulty getting programs on KRSD-TV. Reception is not good. Picture quality was inadequate from the time the station went on the air until late 1968. It has recently improved.

William Francis Duhamel

29. He is station manager of KOTA AM and TV in Rapid City and Secretary of South Dakota Cable Co. In the fall of 1967 South Dakota Cable was in the process of purchasing a CATV system from Western Television Systems. The system had been in operation since 1955 and was in bad shape. It was lying on the ground in places and haphazardly strung on telephone poles. An equipment company appraiser, after inspecting the system, said it was basically junk. At the time South Dakota Cable purchased the system it was not believed that the system was physically capable of carrying a signal. Complaints were received from those not on the cable that they received radiation from the system. The system has since been entirely replaced. Today no one is able to get a picture that is not physically connected with the system.

30. On cross-examination Duhamel made clear that his testimony related only to the general state of the system when it was purchased, and had nothing to do with the performance of the signal of KDSJ-TV at Lead.

Duane Carsten

31. He operates a television retail and service store in Sturgis, South Dakota. Sturgis is about 29 miles from Rapid City and 8 or 10 miles from Lead. He has been in business about 10 years. In connection with his work he has viewed the pictures of KRSD-TV and KDSJ-TV.

32. On the basis of TASO standards, he rated KRSD-TV and KDSJ-TV as the picture of those stations appears in the area he services. His ratings ran thus: KRSD-TV—black and white—in the past—"fine" (picture has high quality providing enjoyable viewing, interference perceptible, interference in picture is very small); KRSD-TV—color—in the past—between "marginal" (picture poor in quality and wish you could improve it, interference somewhat objectionable), and "inferior" (picture very poor, could watch it, definitely objectionable, interference is present); KRSD-TV—black and

white—recently "fine"; KRSD-TV—color—recently "fine"; KDSJ-TV—black and white—in the past—"passable" (picture acceptable, interference not objectionable); KDSJ-TV—color—in the past "inferior"; KDSJ-TV—black and white—recently "passable"; KDSJ-TV—color—recently "inferior".

33. The witness on cross-examination admitted that he services television in a mountainous area, that he personally feels that no high band operation from the south is going to be very successful in the area he services, and that at times the other television station at Lead also presents an inferior picture.

Roy L. Hicks

34. Hicks is chief engineer at KDSJ-TV. He was employed there when McKinney made an inspection of the station in 1967. He testified that he did keep a maintenance log, that it was at the station when McKinney made his inspection, but that he was not there at the time, and he had never informed the operator then on duty where the log was kept.

Testimony of Daniels and McKinney,
Some Extenuating Circumstances,
McKinney Outlines Areas of Technical Weakness.

35. As previously noted, the chief protagonists at the hearing were Eli Daniels and John McKinney. Based upon their testimony it would be possible to bulge these findings with scores of pages of arcane engineering facts. To do so would, however, lend little aid to an understanding of the material facts. Daniels defended his operations through confession, avoidance and argumentation. Much time was devoted on the record to pursuing a thesis by Daniels that McKinney's finding of spurious signal radiation at KDSJ-TV was erroneous and that his instrument readings must have been on signals of a derelict CATV system. This contention, after exposure to cross-examination and rebuttal, ended up in proposed conclusions from licensees which read: "At the close of the hearings in Rapid City it was impossible to determine from the record whether the spurious emissions in question were actually attributable to KDSJ-TV. Events subsequent to that time indicate that KDSJ-TV has, at least intermittently, been radiating spurious signals." To the extent that that language conveys the meaning that McKinney was right, that when he inspected the stations in 1966 and 1967 KDSJ-TV was emitting spurious signals, the statement is accurate. Daniels defended the charges of maintenance log dereliction by establishing such facts as these. Prior to 1966 the two stations kept their maintenance logs in the margins, and on the backs, of transmitter logs. After the 1966 inspection they reformed. Maintenance logs were kept. When McKinney inspected the station in 1967, Daniels was not there and a neophyte attendant was on duty who not only did not know where the maintenance logs were kept, he did not know that they were kept. That maintenance logs were kept in 1967 may be found. But it should be pointed out that that fact helps the licensee's position only a little. Unavailable logs are just as useless to an inspector as are non-existent logs.

36. On the subject of problems originating with the source of its network signal, Daniels did better. The subject stations for a long time obtained their network feed from Bismarck, North Dakota, via microwave. Bismarck obtained its signal from Fargo, North Dakota. Fargo, in turn, obtained its signal from Minneapolis. So many off-the-air pickups did apparently degrade the signal. Further, power and equipment failures in the microwave system created additional problems. After much effort and frustration Daniels finally effected a hook-up with a Rapid City CATV system. Under this arrangement the stations' network signals are brought direct from Denver. This arrangement has substantially improved the quality of the stations' technical service. The arrangement is, however, temporary pending approval by the Commission of an application by the CATV system for a new microwave system to serve the Black Hills area. Daniels has applied for this new service.[2] Daniels also advanced a rather persuasive set of extenuating facts concerning the quality of the KRSD-TV transmitter. Both he and the Commission engineer agreed that KRSD-TV's transmitter is not much good. But, for all practical purposes it is type-approved, as to the licensee's operation, since the transmitter was "grandfathered" in by the same Commission action that excluded its type for prospective acceptance. Transmitters are very expensive and it may be accepted as fact that Daniels does not have the money to replace the one at KRSD-TV. Daniels also made out a pretty solid case for the proposition that an appreciable amount of his technical trouble has stemmed from weather conditions in the area. On many occasions high winds have caused damage to KRSD-TV's antenna tower. In June 1967 a tornado nearly demolished the tower. In January 1968 Daniels filed application for a new antenna system and in September 1968 received temporary authority to operate the new system. He believes the new antenna has improved the quality of KRSD-TV's service. The old antenna is to serve in standby status. Daniels further testified without refutation that although he has a subscription to receive all FCC rules changes, on at least one occasion, involving a change in requirements concerning maximum output power, he did not receive his copy of the rule change. Daniels was also convincing in testifying that technical staff was hard to come by to perform maintenance work.

37. The foregoing findings are not to suggest that Daniels succeeded in impeaching, to any substantial degree, the validity of the violations charged to the licensee stations as a result of the 1966, 1967 inspections. During the hearing, however, it developed that, by then, Daniels had taken some corrective action. On the basis of Daniels' assurances, brief informal visits to the stations, and knowledge that improved power sources had become available to the stations, McKinney undertook to go through the list of violations and identify those where he believed effective corrective action had been taken or that the problem causing the violation no longer existed. While a fair number of violations were thus disposed of, there were many remain-

[2] Letters from Eli Daniels to managers of Mountain Microwave Company, Denver, dated September 9, 1968, and February 14, 1969, requesting the Company to apply to the Commission for a special temporary authority to provide a microwave link for service to KRSD-TV, are in evidence in this proceeding.

ing that McKinney did not believe could be excised from consideration either because he believed them to be still extant or because he did not believe they could be disposed of without further inspection of the stations. Moreover, McKinney undertook to outline in general terms those areas where the technical side of the KRSD-TV—KDSJ-TV operations was fundamentally weak. These included spurious emissions at KDSJ-TV, general construction practices including wiring and shielding, a shortage of technical personnel and implementation of day-to-day maintenance.

38. The hearing was recessed from March 13, 1969, in Rapid City. The continuance was granted for the purpose of permitting the licensees to make further showing. Prior to continuance, the Examiner expressed hope that another inspection of the station might be made. This wish was again expressed on the record on April 17, 1969, during hearing in Washington.

Daniels' Defense, Another Inspection, and Daniels' Response to the Notice of Violation.

39. At the hearing on April 17, 1969, in Washington, the licensees introduced into evidence Daniels' response to those areas of weakness generally outlined by McKinney. The Daniels' statement was addressed to those areas McKinney had outlined on the record. Daniels responded seriatim and described the areas in this order: (1) sideband emissions; (2) faulty wiring and shielding; (3) Dumont transmitter; (4) personnel problems. Daniels' statement reads as follows:

> In order to alleviate or correct the above deficiencies, the following corrective measurements will be undertaken.
>
> 1. RCA has been contacted for the purpose of having a consultant come down and check the KDSJ-TV transmitter for possible spurious emissions. Negotiations are presently being finalized on this matter. (See attached telegram.)[3]
>
> 2. It is the licensee's position that its general construction practices conform to industry standards. However, station personnel have been ordered to keep the transmitter buildings clean and free of debris. In addition, any exposed wires will be placed in a cabinet wherever possible. With respect to the lower supports on the old KRSD-TV antenna, these will be torn down and replaced by ¼" flexible steel cable enclosed in plastic tubing. The structure will employ conventional hangers and clamps, and messenger cable will be used to support the steel cable. It should be pointed out that this antenna tower is presently not in use, since the Commission has granted temporary authority for use of a new antenna.
>
> 3. The licensee does not have the financial resources to replace the Dumont transmitter. However, a 3.58 mc color notch filter has been purchased which can be easily adapted to a lower sideband filter. The installation of this filter and the fact that KRSD-TV is presently operating with reduced power should allow the station to better maintain power and more easily tune the transmitter to its proper output response. In any event the licensee will take such corrective action as is necessary to insure that the Dumont transmitter will be able in the future to maintain authorized power.
>
> 4. There is no easy solution to this problem. As Mr. Daniels testified, recruiting qualified personnel capable of maintenance work is an extremely difficult task. However, in order to avoid going off the air at KDSJ-TV when a maintenance problem occurs, the licensee intends to purchase a camera and film chain for that station. If a microwave problem occurs, the operator will stay on duty, while Mr. Hicks or Mr. Daniels makes the necessary repairs.

[3] A telegram dated April 8, 1969, from RCA to counsel for Daniels confirmed that at the request of Daniels, RCA would make measurements on KRSD-TV and KDSJ-TV for harmonics and spurious emissions.

40. A memorandum dated May 23, 1969, from Paul R. Bateman, RCA Service Company, Chicago, Illinois, to KDSJ-TV and others stated in pertinent part:

5-21: Traveled to Rapid City.
5-22: Picked up test equipment. Borrowed a diode and a directional coupler. Traveled to transmitter near Lead. A line section (15¾") was prepared and fitted with the diode and the 3" directional coupler. Made measurements including spurious with both aural and visual operating into antenna. No spurious responses noted. A fuse blew once in aural transmitter. Some difficulty experienced in connecting aural transmitter to dummy load. Tried to check differential phase and gain. Very jittery display. Because of limited time, this measurement cancelled.
5-23: Departed station.

41. On July 30, 1969, KRSD-TV was again inspected by McKinney. Following inspection an Official Notice of Violation dated August 15, 1969, was sent the station. Specific violations cited in the notice read:

Non-compliance with F.C.C. Rules and Regulations as follows:
1. Section 73.682(a)(12). Transmission Standards. The blanking level shall be transmitted at 75 plus/minus 2.5 percent of the peak carrier level; during the observed time the blanking level was 87 percent which is above the specified level.
2. Section 73.682(a)(13). Transmission Standards. The reference white level of the luminance signal measured 20 percent, which is above the 12.5 plus/minus 2.5 percent of the peak carrier level.
3. Section 73.682(a)(17). Transmission Standards. The reference black level shall be separated from the blanking level by the setup interval of 7.5 plus/minus 2.5 percent; during the observed period the setup level was measured as 3 percent which is below the specified level.
4. Section 73.699 Figure 6. Color burst amplitude measured 20% of sync in lieu of the specified 90% to 110% of sync.
5. 73.687(1)(1) and 73.699 Figure 5. Measurements indicated spurious signals above the visual carrier as follows: Aural plus 4.5 MHz=—30 db; Aural plus 9.0 MHz=—40 db.
All measurements were respective to visual carrier.
6. Section 73.671(a)(1). Operating Log. On July 27, 1969, operator Eli Daniels failed to indicate the time power to the antenna stopped.
7. Section 73.671(a)(3). Operating Log. On July 27, 1969, operator Eli Daniels failed to make entries at half hour intervals after 7:30 PM.
8. Section 73.669(a). On July 27, 1969, operator Eli Daniels failed to sign the "Operating Log" when going off duty.
9. Section 73.671(a)(5). On July 27, 1969, operator Eli Daniels failed to make an entry concerning daily observations of tower lights.
10. Sections 73.689(b)(1)(2) and 73.672(a)(7). The last power calibration in the maintenance log indicated calibration at only the 100% level and failed to show calibration over the range from 80% to a point over 100% of the authorized power output.

42. On August 15, 1969, an Official Notice of Violation was sent licensees covering inspection of KDSJ-TV. The date of the inspection is not stated on the notice. However, as will be shown below the inspection was undoubtedly made by McKinney on July 29, 1969. The notice reads as follows:

Non-compliance with F.C.C. Rules and Regulations as follows:
1. Section 73.687(b)(7). Modulation of the aural transmitter was 70% on peaks of frequent recurrence during the period 1:00–1:30 PM EST. July 29, 1969; during this period one-fourth of this modulation was in the form of noise and distortion.
2. Section 73.699 Figure 6. Color burst amplitude measured 40% of sync in lieu of between 90 to 110% of sync from 1:00–1:30 PM EST, July 29, 1969.

3. Section 73.699(e). The interval between successive measurements of the visual carrier frequency and the difference between the visual carrier frequency and aural frequency shall not exceed one month. The last frequency measurement was May 16, 1969, prior to July 29, 1969.

4. Section 73.672(a)(3)(iii). No entry was made in the Maintenance Log describing the method used in determining the monthly frequency measurement.

5. Section 73.691(a). The visual color monitor was turned off at the time of inspection on July 29, 1969, and operator, Mr. Roy Hicks, was unable to tune in the color program.

6. Section 73.689(b)(1). The Power Calibration of the Visual Transmitter on the dates of February 9, 1969, and May 18, 1969, indicated 5.0 KW which represented 100% power, without the calibration from 80% power, to a point over 100%, to the maximum of 110% power.

7. Sections 73.687(a)(2), 73.687(a)(3), 73.687(a)(6), 73.687(f)(1) and 73.699 Figure 5. Measurements indicated spurious signals above and below the visual carrier as follows: Visual minus 4.5 MHz=−15 db; Visual minus 9.0 MHz=−20 db; Aural plus 4.5 MHz=−15 db.

All measurements were respective to visual carrier.

8. Section 17.38(c)(2). Transmitter log indicated antenna beacon light out from June 27, 1969, through July 1, 1969, without any Federal Aviation Agency notification.

9. Section 73.687(g)(2). Suitable facilities for the welfare and comfort of the operator were not provided.

43. On August 27, 1969, Daniels made response to the August 15, 1969 Notice of Violations addressed to KRSD–TV. His response read:

Reference to your Official Notice of Violation, date mailed, August 15, 1969 and received this office on August 18, 1969.

The following is my response to the notice of violations:

Violations numbered 1 through 4 pertaining to Transmission Standards; (i.e. blanking level, white level, black level and color burst).

These violations were all the cause of very poor network signal quality. Please be informed that during the month of July, and particularly during the last week in July, the service on the NBC feed from the common carrier via the cable company has been very bad to fairly good, but mostly in the poor quality area. Please refer to a letter from Mr. Peter L. Karn, Manager of the local cable company for confirmation. [*]

It was noted by the undersigned that on July 30th (the day of the inspection) the signal quality from the network feed was very bad during most of the forenoon and up until about 3:00 PM, when it suddenly became fairly decent. The latter was noted by the inspectors, since they were at the transmitter station at three o'clock when the picture quality, signal to noise and color became increasingly better. At that time Mr. McKinney commented and said, "that looks like a pretty good picture. Where is that monitor getting its signal?" He was then shown the hook-up to the monitor as coming directly from the transmission line from the transmitter.

I have been informed that the micro-wave system which feeds KRSD–TV and the local cable system has been under extensive repairs and modifications. It is also known that the common carrier, namely, Mountain Micro-wave, recently received FCC approval to install new facilities (FCC news report No. 3737 dated August 15, 1969) to serve the Black Hills area, KRSD–TV included. This then should do much to reduce and eliminate the discrepancies of the above mentioned nature.

Violation #5—Measurements indicated spurious signals above the visual carrier as follows: Aural plus 4.5 mcs.=−30db; Aural plus 9.0=−40db.

Spurious signals above the channel seven band were noted & eliminated as explained below:

The following is a transcript from our maintenance log, which outlines the procedure followed to correct the discrepancy:

[*] Attached to the response is a letter from the Rapid City Cable Co., stating that there were periods during the months of July when considerable trouble occurred with the Cable Co.'s NBC network feed from Denver.

August 21, 1969—5:30 AM to 6:30 AM.

Returned aural transmitter and checked for spurious signals. Increased coupling to the 4x500's intermediate amplifier. This seemed to reduce spurious emission to nill. Further check will be made tomorrow.

Signed Eli Daniels.

August 22, 1969—12:10 AM to 3:58 AM.

Further checks for spurious emissions indicates spurious signals are still present. Indications are that they originate in the FM driver unit. Checks were made with a field strength meter and a directional loop antenna. More checking tomorrow.

Signed Eli Daniels.

August 23, 1969—12:10 AM to 4:00 AM.

Undersigned and Jim Osthy worked on the aural FM driver unit. We discovered a bad grid-leak resistor (R5) and a badly charred tank coil (L3) in the 2nd doubler stage of the FM driver unit. The resistor (R3) 100K ohms measured approximately 225K ohms when it was cold. This resistor no doubt changed values under load! The coil was badly burnt and several turns were shorted, hence this stage could have easily tuned to a higher frequency.

After replacing the above mentioned grid-leak resistor with a 100K ohm unit and rewinding the L3 coil, tests were made once again for spurious emissions. None were detected as coming from the aural transmitter.

Signed—Eli Daniels.

August 24, 1969—3:30 AM to 4:30 AM.

Checking for spurious signals using a Jerrold 704 and also a portable type Amphenol #840 field strength meters. No signals detected above or below the channel seven band. The area checked was plus and minus 20 mcs. from the bands edges. The Jerrold 704 was installed about 30 feet from the channel 7 antenna and with a channel 7 dipole directed to the antenna. Both transmitters were in operation. The visual was operated with a sweep signal from the RCA BW5B and the aural transmitter was unmodulated. No spurious signals detected.

Signed—Eli Daniels.

August 24, 1969—8:00 AM to ——

Rechecking for spurious signals; nothing detected with the 704 above a minus 60 db. Antenna installed about 30 feet from the transmitting antenna. A signal was detected about 70db down from our visual at a frequency of approximately 195 mcs. This signal still prevailed even after both channel 7 transmitters were shut off. This included a shut down of filament supplies and all. The above was noted at between 8:30 AM and 9:30 AM.

Further measurements:

Swept channel 7 visual with the RCA BW5B sideband analyzer, with only the visual transmitter on. No spurious signals noted on the scope above or below the bands edges out to 10 mcs. A small pip was detected at 12.25 mcs. above the band.

Time 10:30 AM

Now checking with sweep into visual transmitter and also with the aural carrier on. No discernable difference noted from the above, except for the aural pip at 4.5 mcs. above the visual carrier.

Time 11:07 AM

MORE CHECKING:

Both carriers on. Visual swept as mentioned above; checking for spurious signals with the Jerrold 704 field strength meter and using a channel 7 dipole directed to the transmitter antenna. No spurious signals noted from the transmitting antenna. Meter set at maximum sensitivity. Detected signals from Channel 11, Lead, So. Dak. on channel and also a signal at approximately 195 mcs. as mentioned above. This signal was determined as not coming from KRSD-TV.

End of tests.

Time 11:20 AM

Signed—Eli Daniels.

Violations numbered 6 through 9, on Operating Log, (i.e. logging times of power shut down, off duty sign off, entries at half hour intervals and daily observation of tower lights). The transmitter log has been brought up to date. Logging was

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left undone due to the fact that I had a group of visitors at the station that Sunday evening. Normal observations were made during the evening and meter readings were noted as normal. Sign-off of all equipment at the transmitter was done within 10 seconds of program sign-off, which was at 10:30 PM.

Violation 10.—Section 73.680(b)(1)(2).

According to the above rule, which became effective March 17, 1969 F.R. Doc. 69-1782; filed Feb. 11, 1969; this rule had been complied with, according to my interpretation. Specifically, the meter was calibrated with the transmitter operating at 80, 100 and 110 percent of authorized power. Also labels below each of the power meters (Aural and Visual transmitters) indicated the meter readings for 80% power and 110% power. These labels and markings were called to the attention of the inspector.

Violation 10.— Section 73.672(a)(7): "Any other entries required by the instrument of authorization or the provisions of this part."

The maintenance log has been corrected to show that calibrations were made at 80% and 110% of authorized power.

44. On September 11, 1969, Daniels made reply to the August 15, 1969, Notice of Violation addressed to KDSJ–TV. His response read.

Reference to your official Notice of Violation to KDSJ–TV, date mailed August 15, 1969 and received in this office on August 18, 1969, the following is my response:

Violations numbered 1 and 2, were the cause of poor network signals. Please refer to my reply to violations 1 through 4 for KRSD–TV, Violation Notice date mailed August 15, 1969; my reply dated August 27, 1969.

Also, fading conditions during July and August further aggravated the bad signal. Since KRSD–TV is forced to operate with a temporary antenna installed on a 61 foot tower, pending action on our construction permit to install our new antenna on top of our 400 foot tower; (see Application for C.P. filed, January 19, 1968/BPCT–4077, and according to a reply to my letter of inquiry dated April 9, 1968—attached*—this application has been pending since April 15, 1968) the KRSD–TV signal at our microwave relay point on Custer Mountain suffers the consequences of the above mentioned fading and weaker signals emanating from KRSD–TV due to the low height of the antenna system now in use.

Efforts have been made during the past to improve our signal into Station KDSJ–TV, Channel 5, Lead, So. Dakota. We have changed the location of our relay station (KCX–93) from Terry Peak to Custer Mountain. Refer to application for C.P. filed April 20, 1968; C.P. granted May 31, 1968, BPTI–1226. Application for license filed August 31, 1968; license granted December 9, 1968 file number BLTI–1240. The change of location of KCX–93, our micro-wave station was made necessary because we experienced so very much interference from the two-way radio installation on Terry Peak. This interference from the two-way installation had been called to the attention of the FCC.

Last but not least, poor transmission quality which happened intermittently is due to technical difficulties. Recent transmission observations and transmitter tests and inspections has revealed abnormal transmissions. More on this subject will be dicussed in my reply to Violation #7 of this report.

VIOLATION #3

Frequency measurements were performed at the KRSD–TV transmitter site and results recorded there in their log. Readings have since been transferred to the KDSJ–TV, transmitter log for June, July and August 1969. This brings our frequency logging for KDSJ–TV up to date. Hence violation #3, complied with.

VIOLATION #4

This violation corrected. A copy of the method used to make measurements from the KRSD–TV log-book (which is the method used) has been inserted into the KDSJ–TV transmitter log book. This violation has been corrected and complied with.

VIOLATION #5

The color monitor seemed to be working properly during my recent visits to the station. It was working normally during the last week end up through Tuesday, September 9, 1969. On Wednesday, September 10, 1969, the monitor was not producing a good picture from our tap-off to the transmitter. It was determined then that transmitter operation was not normal. Problems existed in transmission instead of the monitor.

VIOLATION #6

The power calibrations of the Visual Transmitter on the dates mentioned were made through the range 80% and 110% power. The output meter on the transmitter was marked as required by the rules. It was determined during the measurements that the output meter did read correctly and corresponded to the output power of the transmitter. Logging of this has been inserted in the log book.

VIOLATION #7

Spurious signals as noted in this violation were confirmed by our tests and measurements during the last two weeks. It was determined that we have an intermittent connection, or break down in our transmission diplexer and/or, transmission line and antenna system. This deduction was made on the basis of the fact that when either transmitter (visual or aural) was turned off, the mentioned spurious signals disappeared.

We also detected other spurious signals as coming directly from our visual oscillator exciter. These, we are fairly sure, are due to a bad crystal. A new one has been ordered.

It is going to take at least two weeks to correct the discrepancies noted in Violation #7. A report in the form of an amendment will be submitted upon completion of the work.

VIOLATION #8

The operator on duty at the time that the top beacon light went out was Harold Codner. He said, on questioning by the undersigned, that he called The Black Hills Airport, which is the nearest airport to the station, and reported the outage to them. He was informed by The Black Hills Airport, that he should report the tower light outage to the FAA in Rapid City. He then made repeated attempts to contact the FAA in Rapid City, South Dakota without results. He then called and notified KDSJ-TV management a couple of days later about the outage, whereupon the lights were repaired immediately. The manager, Harry Daniels happened to be out of town for a couple of days, the time the top beacon light went out, hence he was not notified until about two days later. Mr. Codner did not log notification of the FAA since he was unable to make contact.

VIOLATION #9

Arrangements have been made to install a combustion type toilet at the KDSJ-TV transmitter site. The unit has been ordered.

45. Two written statements of John McKinney were received into evidence. They were dated August 6, 1969, and October 16, 1969. In pertinent these statements read:

At the request of the Broadcast Bureau of the Federal Communications Commission, I, John McKinney, Jr., in company with Mr. Samuel B. Stelk, present Engineer-in-Charge of the Central FM-TV Enforcement Unit, travelled in the mobile TV Enforcement van to Rapid City, South Dakota on July 28th, 1969, and on July 29, 1969 further travelled to Lead, South Dakota, and between the hours of 10:30 a.m. and 1:30 p.m., M.S.T., did make engineering monitoring measurements on Television Broadcast Station KDSJ-TV to determine if, in fact, said spurious emissions had been reduced or eliminated. As a result of these observations and measurements on July 29, 1969, I have made the determination that the spurious radio frequency emissions as reported in my testimony at the Rapid City, South Dakota hearing March 10, 1969 to March 13, 1969 were still

present and were beyond the tolerances allowed for spurious emissions by the Rules and Regulations of the Federal Communications Commission. Using a calibrated spectrum analyzer I, John McKinney, Jr., did measure the visual minus 4.5 MHz spurious at −15 db and the visual minus 9.0 MHz spurious at −20 db as referenced to the visual carrier. Additionally the aural plus 4.5 MHz spurious was measured at −15 db in reference to the visual carrier. [August 6, 1969 McKinney Statement.]

I have reviewed an engineering report prepared by RCA Service consultant, Paul R. Bateman, dated May 22, 1969, and submitted to hearing examiner, Thomas Donahue, as Black Hills Exhibit 6 under cover letter from Stephen A. Gold, attorney, dated July 8, 1969. Whereas the methods employed by Mr. Bateman are conventional methods of measurement employed by engineers as part of a standard proof of transmitter performance, I find them totally inadequate as proof that the antenna system of KDSJ–TV was not radiating the spurious emissions which were the subject of a portion of the Official Notices of Violation issued the licensee of this station.

Official Notices of Violation issued the licensee of KDSJ–TV dated September 16, 1966, and October 24, 1967, cited non-compliance with Sections 73.687 (a) (2); 73.687 (a) (3); 73.687 (a) (6); 73.699 Fig. 5 and 73.687 (d) (1), explaining that the transmitter was transmitting spurious mixtures 9 MHz either side of the visual carrier frequency and pointed out that the strongest of these at Aural +4.5 MHz, Visual −4.5 MHz, Visual −3.58 MHz and Visual −9 MHz were inadequately suppressed. It also noted that numerous other spurious products were noted throughout this region, all less than 40 db suppressed. From an analysis of the above measurements two factors were evident:

1. The sideband filter or that portion responsible for the suppression of the color sub-carrier was improperly tuned or defective and

2. Some form of mixing was taking place between the aural and visual carriers producing the spurious signals noted at 4.5 and 9 MHz intervals.

I accept the measurement made by RCA at −3.58 MHz and noted as −37 db which incidentally is beyond our tolerance of −42 db. Adjustments made by the licensee could easily account for a difference of a few db between the time I measured this signal in 1967 and when it was again measured by RCA in 1969.

My concern centers around the lack of showing on the part of RCA Service that the 4.5 MHz and 9 MHz products were not being radiated from the antenna system of KDSJ–TV. When mixtures of this magnitude are observed they are likely to be caused by one of three conditions:

1. Non-Linear rectification caused by corroded or loose connections in the diplexer, transmission line, or the antenna itself.

2. Spurious products present in the incoming signal to the transmitter modulator and improperly suppressed by the transmitter because of sideband filter malfunction.

3. Spurious mixtures generated within the transmitter itself.

Mr. Bateman's tests eliminated the possibility of the last of these premises but did not prove to my satisfaction that the first and second possibilities had been explored, especially the first possibility which from my past experience is the most likely cause of this problem.

The equipment layout shown in the RCA report shows the signal source during these measurements as "Test Pattern Input." It is not clear whether this input is from a generator or monoscope furnished by RCA or whether this test pattern was being supplied from the parent station KRSD–TV, Rapid City, through the microwave link and receiver demodulator equipment normally in use by KDSJ–TV during programming. If the latter was the case then I might possibly eliminate the second possibility as the cause.

This would leave the number one possibility as the most likely cause of these spurious mixture products. Using the equipment set-up Mr. Bateman describes in his report, there is no way of making a determination that the cause is not in the antenna system.

My measurements were made using receivers and associated spectrum analyzers, and after vast experience in the field for over seven years, I have found this method to be infallible.

After the above measurements were made by RCA Service Company, I traveled to Lead, South Dakota, and made a set of measurements on KDSJ–TV using the

same equipment and techniques employed in 1966 and 1967. Measurements were made at a location clear of power line poles and other possible sources of interference in a clearing about 1500 feet from the transmitting antenna. These measurements confirmed the continued existence of the above-mentioned spurious signals. They were performed on July 29, 1969.

In addition to the foregoing statements, I would like to point out that I viewed the picture from KRSD-TV, Rapid City, South Dakota, at the motel in which we stayed on July 28th, 29th, 30th, and 31st, 1969, and compared it with the signal of KOTA-TV, also of Rapid City, and found it to be inferior to that of KOTA in every respect. Programs represented as being in color on KRSD-TV frequently are lacking sufficient color to discern that they are in color. The picture was extremely noisy at times and in my opinion unsuitable for broadcast. Comparing my viewing of KRSD-TV over the several years I have had occasion to view this station, I might make the observation that the quality of the picture has somewhat improved during the past year; but in view of the overall improvement in the state of the art since I first viewed KRSD-TV about nine years ago, there is a question as to whether any small improvement noted is due to the licensee's efforts or the better quality of network feed. (October 16, 1969, McKinney Statement.)

46. On December 3, 1969, a Continuation of Official Notice was sent the licensees by the Commission's Denver Field Office. This notice related to the inspection of KDSJ-TV on July 29, 1969, and Daniels' September 25, 1969 response to that notice. The notice asked for assurance that the station was in compliance with the Commission's rules in the following respects:

Item 7: Sections 73.687(a)(2), 73.687(a)(3), 73.687(a)(6), 73.687(i)(1) and 73.699 Figure 5. Measurements indicated spurious signals above and below the visual carrier as follows: Visual minus 4.5 MHz=−15 db; Visual minus 9.0 MHz=−20 db; Aural plus 4.5 MHz=−15 db.

All measurements were respective to visual carrier.

Please advise the corrective action obtained.

47. On December 17, 1969, Daniels responded to the continuation of notice. His response read:

Since my last letter of September 25, 1969, we have done quite a bit of work on our KDSJ-TV transmitter towards the objective of eliminating the noted spurious signals. It is believed, at the time of this writing, that the objectionable spurious signals have been eliminated.

First, I would like to give a condensed summary of the procedure which we undertook to eliminate the spurious signals (details are available from our maintenance logs).

To begin with, we eliminated our antenna system from the output of the diplexer outward by substituting dummy loads at the output of our diplexer. Spurious signals still prevailed. (Note: Our methods for determining the existence of spurious signals is shown by Fig. 1 and 2 on separate sheets attached.)

By the process of elimination we detected that spurious signals were generated in the FM Aural exciter. It was determined that the last three stages (which are on frequency) had excessive gain and also not well neutralized. Thereby, the stages acted as a receiver and picked up the visual carrier and intermodulation incurred. To eliminate the problem, it was necessary to eliminate one stage and redesign the other two stages for proper neutralization.

Next, procedure was to go through and check neutralization of all other stages in both transmitters. This completed, we again checked for radiation of spurious signals from our antenna system. We found that on measuring as per Fig. 1 and 2, we still detected spurious signals, however, much lower in amplitudes and almost within tolerances. We then proceeded to check our antenna system once again. It was determined that we were feeding too strong a signal from our off-the-air antenna into our measuring equipment. By reducing the R.F. signal, the readings of the respective spurious signals were reduced (i.e. reduced with reference to the visual carrier).

Examples of our end results are as follows:

With one volt R.F. into Sideband analyzer and with Tectronic scope set for full gain, spurious signals just barely discernible db gain of scope set for 60 db gain after vis. reference signal established at approximately 3 centimeters. Therefor, spurious signals as measured hereby much lower than 60 db.

Using the method as per Fig. 2 (Blonder Tongue Field Strength Meter): One volt R.F. in; Vis. set to read one volt.

Vis. minus 4.5 mhs. reading was 1 mv 58 db down
Vis. minus 9.0 mhs. reading was about 70 db down
Aur. plus 4.5 mhs. reading was 1 mv 60 db down
0.7 volts R.F. signal into B.T. meter at Visual carrier
Vis. minus 4.5 mhs. reads 0.7 mv/m 60 db down
Aur. plus 4.5 mhs. reads 0.3 mv/m 77 db down

Note: Also with 0.7 volts R.F. into Side band analyzer per Fig. 1, no discernible spurious signals visible on scope.

Deduction was/is that when spurious signals are noted on the field strength meter and/or sweep/scope method, the R.F. signal feed is too high and thereupon the instruments create spurious signals of their own. As we reduced the R.F. signal input, the spurious readings reduced to greater levels below the referenced signal.

CONCLUSION:

As stated above, it is believed that spurious signals have been eliminated from the KDSJ-TV transmitter. We believe that the readings we do get with the field-strength method (Fig. 2), which are below 60 db, are created in the instrument. We have on order a new field strength meter so that we may make further checks on this issue.

CONCLUSIONS

(1) There can be no doubt that in both 1966 and 1967 KRSD-TV and KDSJ-TV were in substantial violation of Commission rules. So bad were the stations' operations that, during that period, hundreds of viewers complained to the Commission over the poor quality of the service they were receiving from the station.

(2) At the hearing, the fact of the existence of the violations was driven home hard to the licensee. Moreover, the areas of needed correction were clearly outlined. By the end of the Rapid City session of the hearing the licensees were in possession of chapter and verse as to precisely where the technical weaknesses of their stations lay. Following recess but before close of record, the licensees had ample time in which to take comprehensive corrective action. However, an inspection of the stations, carried out after licensees had had plenty of time within which to put their technical house in order, found the stations still in substantial violation of the Commission rules. Further, response to these latter charges of violations, while they do reflect considerable in the way of good faith effort to reform, follow an all too familiar pattern of being long on explanation and short on firm assurance that the problems which gave rise to the violations have been eliminated to the extent that elimination is within licensees' power. With such a background, it is not easy to find justification for renewal of the stations' licenses.

(3) The Examiner is by no means unaware of the ease with which the public interest baby can be emptied out in a tears-of-sympathy bath. On the other hand he is convinced that the sweep of the public interest standard is not so narrow as to preclude thoughtful consideration of extenuating circumstances that may accompany conduct that

otherwise would call for preemptory termination of stewardship. Here the licensees are sore beset. They pioneered their field. They work hard for small remuneration. Their market is small. Their competition is great. Their purse is thin. They suffer manpower shortage. Some of their basic equipment is inefficient. Their source of network signals is fallible. The weather is their enemy. And, it should be noted that called to account they have not been cavalier but, rather, cooperative. Moreover, their efforts at reform have met with some success.

(4) The question of whether or not to renew is a hard one. On the one hand is the need to protect the public from incursions on its interest by the incompetent and inept. On the other hand, it is no easy matter to take the bread and butter out of men's mouths.[1] In the ordering clause below the Examiner has attempted to reconcile these conflicting considerations.

Accordingly, IT IS ORDERED that, unless an appeal is taken from this Initial Decision to the Commission by a party or the Commission reviews the Decision on its own motion in accordance with the provisions of Section 1.276 of the Rules, the applications for renewal of the licenses covering KRSD–TV, Rapid City, South Dakota, and KDSJ–TV, Lead, South Dakota, are GRANTED FOR A PERIOD OF ONE YEAR. In making the foregoing recommendation it is contemplated that prior to the next renewal application a further inspection of the two stations will be made.

FEDERAL COMMUNICATIONS COMMISSION,
THOMAS H. DONAHUE, *Hearing Examiner.*

[1] In this connection the Commission may wish to review its decision in *Star Stations of Indiana, Inc.*, 19 F.C.C. 2d 991, 17 RR 2d 491 (1969).

APPENDIX B

F.C.C. 71-1102

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
ELI AND HARRY DANIELS, D.B.A. THE HEART OF THE BLACK HILLS STATIONS For Renewal of License of Station KRSD-TV, Rapid City, S. Dak.	Docket No. 18358 File No. BRCT-410
ELI AND HARRY DANIELS, D.B.A. THE HEART OF THE BLACK HILLS STATIONS For Renewal of License of Station KDSJ-TV, Lead, S. Dak.	Docket No. 18359 File No. BRCT-564

APPEARANCES

Samuel Miller and *Stephen A. Gold*, on behalf of Eli and Harry Daniels, d/b/as The Heart of The Black Hills Stations: and *Richard M. Riehl*, on Behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

DECISION

(Adopted October 28, 1971; Released November 1, 1971)

COMMISSIONER BARTLEY FOR THE COMMISSION: COMMISSIONERS ROBERT E. LEE AND REID NOT PARTICIPATING.

1. This proceeding involves the applications for renewal of licenses of television broadcast stations KRSD-TV, Rapid City and KDSJ-TV, Lead, South Dakota, filed December 22, 1967, by Eli and Harry Daniels, d/b/as The Heart of The Black Hills Stations. Action on the renewal applications was deferred on April 1, 1968, because of the problems and issues raised by Official Notices of Violation dated September 27, 1966, and October 24, 1967, concerning Station KRSD-TV, and Official Notices of Violation dated September 27, 1966 (corrected copy dated November 4, 1966) and October 24, 1967, concerning Station KDSJ-TV.

2. By Memorandum Opinion and Order, FCC 68-1032, released October 21, 1968, we designated the above applications for hearing. The following issues were specified:

(1) To determine the nature and extent of the violations of the Commission Rules and Regulations by the licensees of Station KRSD-TV, Rapid City, South Dakota, as disclosed by Official Notices of Violation issued against that station on September 27, 1966 and October 24, 1967, by the station's responses thereto, and by related documents:

(2) To determine the nature and extent of the violations of Commission Rules and Regulations by the licensees of Station KDSJ-TV, Lead, South Dakota, as disclosed by Official Notices of Violation issued

against that station on September 27, 1966 (corrected November 1, 1966) and October 24, 1967, by the station's responses thereto and by related documents;

(3) To determine whether the licensees' management and operation of Stations KRSD-TV and KDSJ-TV was so negligent, careless, or inept, or evidences such disregard for the Commission's Rules and Regulations, that they cannot be relied upon to fulfill the responsibilities imposed upon them; and

(4) To determine, in light of the evidence adduced under the foregoing issues, whether the licensees of Stations KRSD-TV and KDSJ-TV are qualified to received (sic) renewals of these licenses and whether renewal of these licenses would serve the public interest.

3. Subsequent to the Designation Order, but before the record was closed, the stations were reinspected. Official Notices of Violation were issued for KRSD-TV and KDSJ-TV on August 15, 1969. In an Initial Decision, FCC 70D-28, released July 17, 1970, Hearing Examiner Thomas H. Donahue concluded that the public interest weighed in favor of granting the licensee a short-term, one-year renewal even though the stations were in substantial violation of the rules in 1966 and 1967 and that the licensee had failed "in impeaching, to any substantial degree, the validity of the violations charged" as a result of the inspections. (*Initial Decision* at 28). The renewal recommendation was made in contemplation that the stations would be reinspected before the next renewal period. Exceptions to the Initial Decision and a brief in support thereof were filed by the Chief, Broadcast Bureau on August 17, 1970. The Heart of the Black Hills Stations filed an opposition to the Bureau's exceptions and supporting brief on September 2, 1970. On October 1, 1971, the Broadcast Bureau filed a petition to update the record to reflect the results of the latest inspections of the stations: Official Notices of Violation issued against KRSD-TV on June 22, 1971 and Official Notices of Violation against KDSJ-TV on June 8 and 24, 1971.[1]

4. Oral argument was held before the Commission *en banc* on October 7, 1971. The findings and conclusions of the Examiner have been considered in light of the exceptions, opposition and brief filed, and of the oral argument and the petition to update the record. We hold that the applications for renewal of licenses must, in the circumstances, be denied. While we disagree with the Examiner's ultimate conclusion that the applications should be granted for a one year term we adopt his findings and conclusions, except as modified in this decision and in our rulings on the exceptions as set forth in the Appendix.

5. The licensee admits that it has "been guilty of occasional mismanagement and negligent operation of the stations,"[2] but it contests the Bureau's position that denial of renewal is the proper penalty. Instead, the licensee argues that there are extenuating circumstances and that the short-term renewal recommended by the Examiner is reasonable in light of the facts of this case.

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[1] The petition has been considered and will be granted.

[2] Opposition to Broadcast Bureau's Exceptions and Brief in Support of Exceptions, filed September 2, 1970, by The Heart of the Black Hills Station at 3.

6. We disagree. While no one of the multitude of rule violations[3] found to exist in this proceeding would ordinarily form a basis for denial of renewal, the record here demonstrates that The Heart of the Black Hills Stations' operation of stations KRSD-TV and KDSJ-TV was conducted in an exceedingly careless, inept, and negligent manner, and that the licensee is either incapable of correcting or unwilling to correct the operating deficiencies shown by this uncontroverted record. In this light, we are compelled to the conclusion that renewal of these licenses is not warranted. We take official notice in this regard of the material contained in the Broadcast Bureau's petition to update the record, filed October 1, 1971, to reflect the results of the most recent inspections of the stations and the violations found at those inspections.

7. The record in this proceeding and the Examiner's detailed findings show that these stations have had a long 10-year history of repeated and serious violations of the Commission's Rules and Regulations governing the technical requirements for operation of broadcast stations. These violations included, but were not limited to, such basic matters as faulty tower lighting deficiencies, operation below authorized power, spurious emission, maintenance logs, and such serious deficiencies in the quality of picture transmission that they were virtually unviewable. The tower lighting violations present an obviously potential air safety hazard, and the spurious emissions are on a frequency close to that of an air traffic control frequency. With respect to the quality of the video signal being transmitted to the public, the record establishes that, because of its serious technical and operating deficiencies, the licensee has not been providing the Rapid City and Lead communities with a picture of usable quality since at least 1965.[4] In this regard, we find it to be particularly relevant that we were compelled in 1966 to grant an unusual waiver of our CATV carriage and non-duplication rules (Section 74.1103) to the Rapid City CATV system, because KRSD-TV was providing a signal of such poor quality that it was not usable by the cable system. *Black Hills Video Corporation*, 2 FCC 2d 243 and 465 (1966). Accordingly, we relieved the cable system of the rules requirements "until such time as it appears that KRSD is providing a signal of acceptable quality. . . ." 2 FCC 2d at 466. It is now more than five years later, and the waiver is still in effect.

8. Further evidence amassed in the record of the licensee's failure to provide even a minimally adequate technical service to its public is afforded by: a petition signed in 1967 by 2,000 viewers in Rapid

[3] The Examiner found that one or both of the stations were guilty of, among others, the following violations: (1) emission of spurious signals; (2) operation below authorized power; (3) reference white level and set-up not properly maintained; (4) improper color burst amplitude; (5) substandard wiring and shielding; (6) antenna tower lighting violations; and (7) logs not properly maintained or unavailable to Inspector at time of inspection. *Initial Decision*, FCC 70D-28, released July 17, 1970 at 28 and 44-45. *See also Initial Decision* at 3-11, 13-15, 19-21, 27-29 and 31-33. The licensee committed 56 infractions of 33 separate rule violations during the 1966 and 1967 inspections alone. The net effect of these technical violations was to deprive the public of a viewable picture.

[4] KDSJ-TV, Lead, S.D. operates as a satellite of KRSD, Rapid City, being fed the latter's programs via their licensed private inter-city microwave link. Thus, the degraded quality of the originating signal at Rapid City is likewise transmitted to KDSJ-TV at Lead.

City concerning the poor picture quality of the station,[5] which requested the Commission and NBC to attempt to improve the service; the testimony to this effect at the hearing by several public witnesses; and the fact that the Commission's inspector found the KRSD TV picture unsuitable for broadcast as late as the July 1969 inspections. The Examiner found, moreover, that the hearing had clearly outlined those areas where technical corrections were needed and that, by the time of the July 1969 inspections following the end of the Rapid City phase of the hearing, ample time had elapsed to enable the licensee to take comprehensive corrective steps. Yet the 1969 inspection found KRSD-TV and KDSJ-TV *still* in substantial violation of the *same* rules that the 1966 and 1967 inspections found, all of which resulted in a serious adverse impact on the quality of the picture being broadcast to the public. Since the licensee's stations were the NBC affiliates in the markets, it is clear that the communities were being effectively deprived of that network's programs. This fact, in conjunction with the continuing waiver, *supra*, raises the fundamental issue of whether this licensee is technically qualified to remain a licensee of these stations. We believe that it is not, and we are of the opinion that the Examiner failed to give sufficient weight to this serious and adverse impact which the licensee's violations had on its obligations to render a satisfactory service to the public.

9. One of the underlying purposes of the Communications Act of 1934, as amended, is to provide an efficient and adequate broadcast service to the people of the United States. The Commission is directed by the Act, among other things, to "regulate the kind of apparatus to be used with respect to its external effects and the purity and sharpness of the emissions from each station and from the apparatus therein." (Section 303(e)). The Courts have long recognized that the Commission's regulations governing technical operation of broadcast stations "are vitally essential to the maintenance of adequate radio reception and service," and have upheld the Commission's refusal to renew the license of a broadcast station which had repeatedly violated the Commission's technical regulations. *Greater Kampeska Radio Corp. vs. F.C.C.*, 108 F. 2d 5. 7 (D.C. Cir. 1939).

10. The Commission is normally reluctant to deny renewal of a broadcast license solely for violations of its technical rules. Yet it must be recognized, as we have done in the past, in carrying out our statutory responsibilities that:

> [O]ne of the most essential duties incumbent upon the licensee of a broadcast station is that of insuring the continuous operation of the transmitting equipment. In fact, this is an indispensable condition to the good service of any station. Failures of this equipment, due to causes reasonably within human control, whereby the public is deprived of service, denotes a state of carelessness and mismanagement which this Commission, in the exercise of its regulatory authority, will not condone.

Brooklyn Broadcasting Corporation, et al. 4 FCC 521 at 531. (1937). *See also Charles C. Carlson (WJBW) et al;* 12 FCC 902 (1948), aff'd 172 F. 2d 766 (D.C. Cir. 1949), *Cert. denied* 337 U.S. 930 (1949).

Therefore, when we are presented with a record, as has been established in this hearing, of at least 10 years of violations of sub-

[5] The population of Rapid City is 43,836. Lead has a population of 5,420 (1970 Census). KRSD-TV's net weekly circulation is 23,000 (Source: ARB Television Market Summary, Feb-March 1971). It can thus be seen that the 2,000 signatures on this petition represent a significant portion of KRSD's audience.

stantially the same rule requirements for satisfactory operation, which violations have had the cumulative effect of depriving the public of the very service for which the licenses were originally granted, then we are virtually compelled to the conclusion that renewal is neither justified nor warranted in the public interest. We must, in the present circumstances, agree with the position taken by the Broadcast Bureau that:

> The number, nature and extent of the violations reflected in the record of this proceeding represent perhaps the most flagrant dereliction of a licensee's responsibility in the operation of its television stations that has yet to come before the Commission.
>
> *

(Broadcast Bureau's Exception No. 5 at 13).

11. We, therefore, conclude that the licensee cannot be relied upon to operate these stations in the future in accordance with the requirements of its licenses and the Commission's Rules; that it is either technically incapable or unwilling to correct operating deficiencies when brought to its attention; and that it is, therefore, not qualified to remain a licensee of these stations.[6]

12. Accordingly, IT IS ORDERED, that the petition to update the record, filed October 1, 1971, by the Chief, Broadcast Bureau IS GRANTED.

13. IT IS FURTHER ORDERED, That the above-captioned applications of The Heart of the Black Hills Stations for renewal of licenses of television broadcast stations KRSD-TV, Rapid City, and KDSJ-TV, Lead, South Dakota, ARE DENIED.

14. IT IS FURTHER ORDERED, That in order to enable The Heart of the Black Hills Stations to wind up its affairs IT IS AUTHORIZED to operate stations KRSD-TV and KDSJ-TV until 12:01 a.m., December 31, 1971; PROVIDED, however, that if The Heart of the Black Hills Stations seeks rehearing and/or judicial review of our Decision, it is authorized to continue to operate stations KRSD-TV and KDSJ-TV until thirty (30) days after the final disposition of such appeal.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

APPENDIX

Rulings on Exceptions of the Chief, Broadcast Bureau to the Initial Decisions.

Exception No.	*Rulings*
1	*Granted* for the reasons stated in paragraphs 6-10 of our Decision herein.
2, 3, and 4	*Denied.* The requested rulings are not decisionally significant.
5	*Granted.* The findings and conclusions of the Examiner as supplemented herein require denial of the renewal applications in the public interest. See also paragraphs 6 and 10 of our Decision herein.

[6] We note that the licensee has argued, in extenuation, that it has lacked the financial resources to remedy the deficiencies above described, including replacement of the KRSD-TV transmitter. This contention may, in turn, raise questions as to the licensee's financial qualifications to continue operation. However, resolution of that issue is not necessary to our decision.

APPENDIX C

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	FCC 72-665 79946
Eli and Harry Daniels, d/b/as THE HEART OF THE BLACK HILLS STATIONS	)	DOCKET NO. 18358 File No. BRCT-410
For Renewal of License of Station KRSD-TV Rapid City, South Dakota	)	
Eli and Harry Daniels, d/b/as THE HEART OF THE BLACK HILLS STATIONS	)	DOCKET NO. 18359 File No. BRCT-564
For Renewal of License of Station KDSJ-TV Lead, South Dakota	)	

MEMORANDUM OPINION AND ORDER

Adopted: July 26, 1972 Released: August 1, 1972

By the Commission: Chairman Burch absent; Commissioners Reid and Wiley abstaining from voting; Commissioner Hooks not participating.

1. The Commission has before it for consideration: (a) a petition for reconsideration of our Decision, FCC 71-1102, 32 FCC 2d 196, released November 1, 1971, denying the above-captioned applications, filed December 1, 1971, by Eli and Harry Daniels, d/b/as The Heart of The Black Hills Stations (Black Hills); (b) a petition to

reopen and update the record, filed December 1, 1971 by Black Hills; (c) a supplement to petition to reopen and update the record filed December 2, 1971 by Black Hills; (d) an opposition to the petitions for reconsideration and to reopen and update the record, filed December 13, 1971 by Chief, Broadcast Bureau; and (e) a reply to the Broadcast Bureau's opposition, filed January 6, 1972.

2. The history of this proceeding has been adequately detailed in our order designating these applications for hearing, FCC 68-1032, released October 21, 1968, and in Hearing Examiner Donahue's Initial Decision, FCC 70D-28, 32 FCC 2d 201, released July 17, 1970, granting a one year renewal of the licenses of KRSD-TV, Rapid City, and KDSJ-TV, Lead, South Dakota. By Decision, FCC 71-1102, 32 FCC 2d 196, released November 1, 1971, we reversed the Initial Decision and denied renewal of these licenses in light of the licensee's long history of technical rule violations which have had the cumulative effect of depriving the public of the licensed service. Black Hills has now filed petitions for reconsideration of the Decision and to reopen and update the record, which petitions are opposed by the Broadcast Bureau.

3. Black Hills' petitions for reconsideration and to reopen and update the record, urging reconsideration of the Commission's denial of renewal of the licenses of KRSD-TV and KDSJ-TV, rely principally on the following contentions:[1] (1) the Commission relied upon a mistake of fact concerning continuation of the waiver of the CATV rules[2] in denying the renewal applications;

[1] Arguments made in the petitions which were previously raised by Black Hills and disposed of by the Commission, will not be dealt with herein.

[2] *Black Hills Video Corporation*, 2 FCC 2d 243 and 465 (1966). In 1966, we granted a waiver of our CATV carriage and non-duplication rules to the Rapid City CATV system because

(2) the stations' picture quality has improved; (3) many of the causes of the rule violations were beyond human control; (4) its explanations of the rule violations were disregarded by the Commission; and (5) it lacks sufficient funds to replace inefficient equipment. The opposition filed by the Broadcast Bureau contradicts these arguments and strongly urges denial of both petitions. In the interest of a more comprehensive understanding of the points raised by these pleadings, we will deal with the various contentions made by the licensee, and the Bureau's oppositions thereto, according to the subject matter involved.

Withdrawal of CATV Waiver Request

4. Black Hills claims that the Commission was in error when it stated in the Decision denying renewal of KRSD and KDSJ, that the CATV system's requested waiver of the carriage and non-duplication rules, Section 74.1103 of the Rules, was still in effect.[3] Black Hills argues, however, that the cable system withdrew its waiver request by letter dated July 5, 1968, as part of an agreement between KRSD and Multi-Pix of South Dakota, the then owner of the cable system,[4] and it

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KRSD-TV was providing a signal of such poor quality that it was not usable by the cable system. *Black Hills Video Corporation*, 2 FCC 2d 243 and 465 (1966). In our Decision denying Black Hills' renewal applications, we stated that this waiver was still in effect.

[3] 32 FCC 2d 196, at 198.

[4] The agreement was not implemented until August 25, 1969. This delay in implementation resulted from a provision in the agreement requiring that KRSD receive its network signal from a common carrier, Mountain Microwave Corporation, whose construction permit-renewal applications were not granted by the Commission until August 13, 1969. *Mountain Microwave Corporation*, 18 FCC 2d 1016 (1969).

attaches copies of the letter and agreement to its petitions as "Exhibits 1 and 2."[5] It therefore contends that KRSD's signal has been of "usable quality since late 1968." (Black Hills' Petition for Reconsideration at p. 3).

5. The Broadcast Bureau finds meaningless the licensee's reliance upon the CATV operator's request for withdrawal of the waiver of the carriage and non-duplication rules. First, the condition precedent which the Commission placed on lifting the waiver, i.e., KRSD-TV's providing a picture of "acceptable quality",[6] has not been met. Additionally, the CATV operator's July 5, 1968 letter[7] to the Commission asking withdrawal did not affirmatively advise the Commission that KRSD was providing a picture of acceptable quality. The withdrawal was based solely upon an agreement between Black Hills and the CATV operator.[8] Secondly, the Bureau argues that the above agreement dispels any inference that by 1968, Black Hills was providing a viewable picture because, by its terms, the agreement permits the cable operator to duplicate all KRSD-TV network programming except for the distant station's local commercials and station identifications,[9] thereby

[5] It should be noted that the aforementioned letter and agreement, attached to Black Hills' Petition as "Exhibits", are not part of the record of the hearing to date, and have not heretofore been offered or relied upon by the licensee.

[6] *Black Hills Video Corp.*, 2 FCC 2d 465 at 466, adopted February 2, 1966.

[7] *Black Hills' Petition for Reconsideration*, Exhibit 1.

[8] *Id.*, Exhibit 2.

[9] *Id.* Exhibit 2 at p. 2 paragraph 4, which provides as follows:

"4. KRSD-TV agrees to permit CABLE [Multi-Pix] to receive all of its programs and to receive all duplicating programs as provided by . . . (?) (sic) [copy not legible] from

insuring an alternative and dependable programming service.

6. In reply, Black Hills dismisses the Bureau's opposition, arguing that, because the waiver was granted only on the basis of pleadings, the Commission never made its own determination of KRSD's picture quality.[10] Moreover, it claims that, in 1966, KRSD requested non-duplication protection because of improved picture quality prior to the request for withdrawal of the waiver.[11] However, this request was not acted upon by the Commission.

Picture Quality

7. Black Hills argues that the record does not support the conclusion that it has not provided a picture of usable

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more distant TV broadcast stations during the term of this Agreement, and KRSD-TV hereby waives any rights with which it might be conferred under FCC rules to demand deletion of programming by CABLE."

[10]This argument may not be in keeping with the facts. The Commission's files indicate that the 1966 waiver was granted not only upon the basis of the CATV system's pleading (to which KRSD never responded), but also on the basis of information available to it, disclosing that the KRSD signal "was of such poor quality that it was not usable by the cable system." (See Commission Memoranda Opinions and Orders, of January 5 and February 2, 1966, 2 FCC 2d, 243, 244, and 465, 466, respectively.)

[11]The licensee's Reply to Broadcast Bureau's Opposition also has attached to it what is termed "Exhibit 1", which consists apparently of copies of letters from its counsel and Black Hills to the Commission, dated September 6 and 7, 1966, respectively, requesting reimposition of the non-duplication condition by the CATV system. Here, again, as in the situation noted in footnote 5 *supra*, there is no indication that these letters were offered heretofore by the licensee for the record of the hearing herein.

quality since 1965. In support of its argument (in addition to the CATV waiver argument, *supra*), Black Hills claims that, while a majority of the six public witnesses who testified at the hearing as to picture quality said that the picture had been unsatisfactory prior to the fall of 1968, there had been a marked improvement subsequently. Black Hills also challenges the importance and validity of the 1967 petition signed by 2,000 viewers protesting the picture quality of the stations, which the Commission stressed in its Decision. In contrast, the licensee points to its Petition to Reopen and Update the Record, which includes a compilation of copies of viewers' letters solicited over KRSD-TV and KDSJ-TV,[12] which Black Hills claims attest to the viewability of the stations' signals. In addition, petitioner states that it has a thousand more letters in its files which, it contends, are evidence of its service to the public. Black Hills notes that B.H. Dail, who circulated the 1967 petition, sent KRSD a letter attesting to the improved quality of the service from KRSD and KDSJ. Moreover, it is argued, the FCC Inspector's July 1969 finding that the picture was unsuitable for broadcast should be limited to the short period of time when he was in Rapid City.

8. The Bureau rejects Black Hills' principal claim of factual error (*i.e.*, the Decision's finding that the stations had failed to provide a viewable picture since 1965), and quotes the licensee as saying that "the only time I failed to provide the public with a viewable picture, was during the three year period prior to the designation" order in

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[12]The Petition to Reopen and Update the Record contains the above letters from viewers, as well as an affidavit from Eli Daniels explaining the reasons for the various rule violations.

1968. (*Broadcast Bureau's Opposition* at p. 6).[13] This amounts to an argument by Black Hills, the Bureau asserts, that it only failed to provide a "viewable" picture for 3 years. No decisional significance is found by the Bureau in the asserted error because, they state, it is irrelevant whether the licensee failed to provide a viewable picture for 3 years instead of 5 years; what is relevant is the failure for an extended period of time.

9. The Bureau points out that the licensee's claim of factual error is premised upon three contentions, each of which the Bureau rejects, to wit: (1) the 1968 withdrawal of the request for waiver of carriage and non-duplication rules; (2) the contention that the record establishes that the public was provided with a viewable picture from late 1968 through the hearing in March 1969; and (3) the claim that the results of the 1969 inspection (*i.e.*, that KRSD was transmitting a picture unsuitable for broadcast) must be limited to the period when the FCC inspector was actually in Rapid City.

10. The Bureau's response to the first argument (withdrawal of waiver request) has already been summarized in para. 5, *supra*. As to the second argument regarding picture quality, the Bureau concedes that the

[13] Black Hills charges that the Bureau distorted the record and the licensee's contentions in "manufacturing" the quotation to the effect that only during the three year period prior to designation did it fail to provide a viewable picture (*Reply to Broadcast Bureau's Opposition to Petitions for Reconsideration and to Reopen and Update the Record* at p. 2 quoting from the *Broadcast Bureau's Opposition* at p. 6). Black Hills denied making such a statement or that such a statement could be inferred from the record. It claims that the Bureau devised the word "unviewable", which never was used by the licensee. While Black Hills admits that some public witnesses characterized its picture as "unsatisfactory" or "unreliable", it argues that such terms are not equivalent to "unviewable".

licensee provided to the public with a viewable picture from late 1968 through March 1969;[14] however, it does not regard this as proof that such improved service has continued, which it asserts is the real factor of decisional significance. What the Bureau claims to be really significant is the fact that, despite the Examiner's statement during the hearing on April 17, 1969, that he "was disposed to deal lightly with the licensee" if the remaining problems were cleaned up within 90 days, the service again reverted to its previous "unsuitable for broadcast" level within that same 90 days after the staff concluded the hearings in Rapid City in mid-March 1969. The latter situation was established by the results of the July 30, 1969, inspection. From this, the Bureau concludes that apparently only the physical presence of the Commission's staff in Rapid City can insure that the licensee will operate its stations satisfactorily and in compliance with Commission Rules. As to the third argument, the Bureau states that Black Hills misconstrues its burden when it claims that the proof regarding picture quality must be limited to that period in 1969 during which the FCC inspector was in Rapid City. It points out that the same lack of video components, which the licensee admits made its picture unsuitable for broadcast, was present during the inspections of 1961, 1966, 1967, 1969 and 1971; that the only proof offered by the licensee that these deficiencies were due to causes other than broadcast equipment were statements on those occasions by the licensee's principal to that effect; and that the record establishes that such excuses had no basis in fact. The Bureau therefore submits that Black Hills has

[14]It should be noted that this period coincides with and spans the months from the designation for hearing (October 21, 1968) through the Rapid City phase of the hearing (March 10-13, 1969).

failed to show a basis in this regard for reversal of the Commission's Decision.

11. Turning to the viewers' letters submitted by Black Hills in support of its claims regarding picture quality, the Bureau argues that they should be accorded little, if any, weight in part because of the almost "deceptive"[15] broadcast announcements in the solicitation of the letters by the licensee over KRSD and KDSJ. These broadcast statements implied that the denial of the renewal applications would permanently deprive viewers of CBS programming and a second program source, whatever its quality. The solicitation is characterized by the Bureau as "deceptive" because it failed to state that the Commission has consistently taken all possible steps in other similar cases to insure uninterrupted or promptly re-established service. According to the Bureau, fear of a lost program source was the primary motivation behind the letters and, therefore, greater weight should be accorded the reason the letters were written, rather than the reasons advanced in the letters for renewal of these licenses. The Bureau contends further that even if the letters were to be considered as indicating improved service since 1969, they could not affect this Decision because here the central question is whether this licensee can be "relied upon to maintain this service in the future." (*Bureau's Opposition* at p. 17). The Bureau answers this question in the negative and points out that many of the letters confirm unsatisfactory service prior to the designation order.

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[15] *Broadcast Bureau's Opposition* at p. 17.

Rule Violations Caused by Factors Beyond Human Control

12. Black Hills argues that the Commission's reliance on *Brooklyn Broadcasting Corporation,* 4 FCC 521 (1937), as authority for denying renewal, is misplaced. That case, Black Hills argues, involved equipment failures "due to causes reasonably within human control, whereby the public is deprived of service, . . ." and is not applicable to the instant case, because here "in many instances the violations were due to causes not within human control." (*Black Hills Petition for Reconsideration* at p. 4). In support of this argument, Black Hills asserts: (1) that the 1967 tornado all but demolished its antenna tower, (2) that "network service has been poor",[16] (3) that KRSD's Dumont transmitter, "though type-approved at the time, is not much good" (*Id.*), (4) that the picture at the last inspection was impaired because of water that entered the transmission line through a crack, and (5) that VHF TV signals are subject to fading during the summer months and that Black Hills has had most trouble with its signal from the common carrier from June through August, during which time the stations were inspected.[17]

13. The Bureau's opposition takes issue with Black Hills' treatment of the technical violations attributed to

[16]In his affidavit, attached to Black Hills' Petition to Reopen and Update the Record, Eli Daniels states that he anticipated, at the time of the hearing, receiving "a superior picture once service from the common carrier," Mountain Microwave, commenced. However, he states that Black Hills has had picture problems with this service. (Affidavit at p. 2).

[17]It should be noted, contrariwise, that the stations were in fact inspected in September 1966, October 1967, July 1969 and May 1971.

its two television stations and its attempt to distinguish *Brooklyn Broadcasting Corporation, supra,* from the instant case. The Bureau argues that even if some of the violations were the result of causes beyond human control, Black Hills has failed to rebut its "long history of failing to promptly re-establish the service when problems did occur." (*Bureau's Opposition* at p. 10). In particular, the Bureau notes that, for 8 years, the licensee failed to correct transmission line support defects which permitted the line to sway. Yet during this period, the Bureau states, the licensee was not able to achieve and to maintain authorized power because it claimed that wind damage to the transmission line made it impossible to achieve full power. Likewise, the Bureau's opposition points to a number of instances in the record, going back several years, where known deficiencies were called to the licensee's attention and the latest inspections showed they had not been corrected, despite the licensee's promises to do so. Referring to the 1967 tornado which severely damaged KRSD's antenna and tower causing a multi-image picture, the Bureau notes that, in spite of this serious damage, Black Hills did not file an application for a new antenna to replace the damaged one until 7 months had passed. With this background, the Bureau submits that the consequences of the wind damage were not beyond human control. In response to the contention that VHF signals are subject to summertime fading from June through August, the Bureau notes that only one of the last four inspections occurred in these months[18] and, therefore, it rejects this explanation of Black Hills' deficient picture quality as found during the inspections. In reply, Black Hills seeks to clarify the VHF summertime fading argument by explaining that "summer", for

[18] *Id.*

the purposes of VHF-TV signal fading, includes the months of May through September. Thus, the licensee concludes that three of the four inspections were conducted during "summer" months and that this, in part, accounts for its less than satisfactory picture quality. The seven months' delay in filing the antenna application is defended by the licensee on two grounds: first, that antenna problems are not quickly diagnosable, especially absent a standby antenna; and, second, that preparation of an antenna application is both complicated and time consuming.

Lack of Funds

14. Black Hills refers to its application for a new antenna system, filed in January 1968, to replace the one damaged by the 1967 tornado.[19] It argues that without a grant of the new antenna system, it has been unable to expand its net weekly circulation by increasing its "set count", and that, had it been permitted to do so, CBS would have increased its "network rate" from $100 to $250 "with this increase (sic) set count" (Affidavit of Eli Daniels, at p. 2, contained in Black Hills' Petition to Reopen and Update Record). Because this anticipated increase in revenues has not occurred, KRSD claims that it has been unable to replace its inefficient Dumont transmitter and make the promised improvements in facilities.

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[19]Black Hills also referred to the antenna application at the October 7, 1971, oral argument in this proceeding. (Tr. pp. 669-74). The application has not been granted in accordance with the Commission's policy of not acting on major facility changes during a renewal hearing. The licensee is currently operating with a new antenna under special temporary authority.

15. The Bureau rejects Black Hills' argument that Commission failure to grant its new antenna application was the reason for its failure to make the improvements promised in 1969, and it disputes the validity of the figures used by Black Hills regarding circulation and "set count". Finally, the Bureau concludes that this is the "first time" that the licensee has raised this lack of funds issue, as well as the contention that the promised improvements were conditioned upon a substantial increase in revenues. The Bureau asserts that Commission precedent precludes Black Hills from relying on these facts not previously revealed.[20]

Black Hills' Complaint Regarding the Nature of the Commission's Decision

16. Black Hills argues that the Commission "relied heavily on the Broadcast Bureau in drafting its decision" denying renewal, and that, therefore, the "decision has completely disregarded the licensee's explanations and has weighed the evidence unjustifiably against it." (*Black Hills Petition for Reconsideration* at pp. 1-2).

17. The Bureau rejects Black Hills' allegations as unsupported by fact, and labels the argument an "irresponsible" charge that is possibly "unconscionable". (*Broadcast Bureau's Opposition* pp. 2-3, citing as authority Oral Argument in *Vinita Broadcasting Company, Inc.*, Docket No. 18085, Tr. 685-86). Also rejected is Black Hills' contention that its own explanations were "completely disregarded" by the Commission in drafting the Decision. The Bureau notes that the Commission did consider these explanations in paragraphs 5 and 6 of the

[20]Citing *Central Coast Television*, 3 FCC 2d 524 (1966). See footnote 23, *infra*, for pertinent language of the Commission's holding.

Decision, but found that they were insufficient to warrant renewal of the licenses, and often short on factual support. Moreover, the Bureau views the central issue of this case to be "whether, based on the licensee's past record of performance, the Commission can rely on the applicant in the future to operate its stations in compliance with the Rules and provide the public with the technical service its license requires." (*Bureau's Opposition* at p. 5). Black Hills' petition and claims of error are characterized by the Bureau as picking at bits and pieces of the Decision, none of which would affect the Decision's ultimate conclusion denying renewal.

18. Black Hills responds to the Bureau's allegation of improper advocacy, noting that it never stated that the Commission improperly relied upon the Bureau in rendering the Decision. However, it contends that it is clear that the Commission "utilized the Broadcast Bureau's language", because the Decision contains many lengthy quotes and paraphrases from Bureau pleadings, some of which incorporated incorrect facts which were, in turn, adopted by the Commission.

Discussion

19. It does not appear that any lengthy analysis is required in the circumstances of this case. In our opinion, the brief and inadequate petition for reconsideration filed by the licensee has been wholly rebutted by the Broadcast Bureau's Opposition, and it is manifest that Black Hills has not made out a case for reversal of the Commission's Decision denying renewal. Moreover, it would appear that both the petition for reconsideration and the "Petition to Reopen and Update Record" are procedurally defective, since they do not comply with

the requirements of Section 1.106 of the Regulations.[21] Each of these pleadings relies on so-called "Exhibits" (attached to the Petition) which were not heretofore offered as part of the record herein, although they were in the licensee's possession and knowledge, and each contains materials which the licensee has failed to show involves new and changed circumstances, previously unknown to him and which could not have been ascertained through the exercise of ordinary diligence. See *Central Coast Television*, 3 FCC 2d 524, 525 (1966). In any event, and despite the procedural deficiencies, an analysis of the content of the arguments and assertions made by the licensee will, as shown below, demonstrate that they are without merit and do not warrant a reconsideration and reversal of the Commission's action herein.

20. It must be emphasized that the Commission's approach in considering an application for renewal of license, though judged on the past conduct of the

[21] Section 1.106(c) of the Rules governing Petitions for Reconsideration of final action provides as follows:

> (c) A petition for reconsideration which relies on facts which have not previously been presented to the Commission or to the designated authority, as the case may be, will be granted only under the following circumstances:
>
> (1) The facts relied on relate to events which have occurred or circumstances which have changed since the last opportunity to present such matters;
>
> (2) The facts relied on were unknown to petitioner until after his last opportunity to present such matters, and he could not through the exercise of ordinary diligence have learned of the facts in question prior to such opportunity; or
>
> (3) The Commission or the designated authority determines that consideration of the facts relied on is required in the public interest.

See footnotes 5 and 11, *supra*.

licensee, nevertheless requires an affirmative finding that the licensee's operation of the station *in the future* will serve the public interest, convenience and necessity. In this regard, we agree with the Bureau that, even when all of the licensee's "excuses" for his past delinquencies are taken into account, the central issue for determination remains—*i.e.* can the Commission rely on Black Hills to operate its television station in the future in accordance with the rules and to render a satisfactory service to the community? In our view, the record in this proceeding speaks overwhelmingly against any such assurance on any reasonable grounds, even when the licensee is given every benefit of doubt with respect to those instances which indicate that the public in Rapid City has been deprived of a viable second service in the community. As far as the *record* of the proceeding is concerned, there is no factual basis for Black Hills' assertion that it is now rendering a viable service and that it is able and qualified to do so in the future.

21. Turning to the basic points argued by the licensee in his petitions, it appears that two main arguments are being made:

> (1) The Commission was mistaken in fact when it rested its Decision on the basis that KRSD was not affording the public with a usable signal and thus was depriving the community of the licensed service; and (2) the technical violations attributed to the licensee which degraded its service were not due to the licensee's faults.

However, as an initial complaint, the licensee claims that the Commission disregarded its explanations of the rule violations and relied too "heavily on the Broadcast Bureau in drafting its decision". There is no foundation for such a claim; the Decision did, in fact consider these

explanations and alleged "extenuating circumstances", but concluded properly that they did not justify the conduct found to exist, and were insufficient to rebut the conclusion that the licensee's "operation of stations KRSD-TV and KDSJ-TV was conducted in an exceedingly careless, inept, and negligent manner, and that the licensee is either incapable of correcting or unwilling to correct the operating deficiencies shown by this uncontroverted record" (32 FCC 2d at p. 198). Neither the petition for reconsideration nor the petition to reopen and update the record offer new material which would require changing this conclusion.

Picture Quality and Withdrawal of CATV Waiver Request

22. As indicated above, Black Hills' principal claim is that the Decision contains the factual error that the stations had not provided a picture of usable quality since at least 1965. This claim is based upon three allegations: (1) the 1968 request by the then owner of the CATV system for withdrawal of the waiver of the carriage and nonduplication rules (Section 74.1103); (2) a viewable picture was provided from late 1968 through the hearings in March 1969; and (3) the FCC inspector's 1969 finding that the picture transmitted was unsuitable for broadcast must be limited to the time that the inspector actually was in Rapid City.

23. Black Hills argues that it has provided a signal of usable quality since late 1968 when it was granted temporary authority to operate with a new antenna system. This conclusion is buttressed, in Black Hills' view, by the fact that the request for waiver of the CATV rules was withdrawn by the CATV operator by a letter to the

Commission dated July 5, 1968.[22] By way of background, the Commission granted a waiver of the carriage and non-duplication rules in January 1966 because it appeared that KRSD-TV's signal was not usable by the cable system (2 FCC 2d 243, 244 (1966)). The waiver was premised upon a letter dated January 3, 1966, from Black Hills Video Corporation, the then operator of the CATV system, which alleged that it had attempted to carry KRSD on December 31, 1965, but that the signal was "of [a] totally unusable quality," as well as upon certain preliminary investigational reports by the Commission's field staff. The system had received numerous subscriber complaints requesting either restoration of the previously carried NBC Denver signal or cancellation of their service (2 FCC 2d at p. 244). The Commission granted immediate relief from the rules on January 5, 1966, but authorized Black Hills to answer the cable system's allegations. Black Hills, however, did not respond to the allegations, and the Commission stayed the carriage and non-duplication rules on February 2, 1966 (2 FCC 2d 465).

24. The Memorandum Opinion and Order staying the rules, *supra*, contained the condition precedent that "[u]ntil such time as it appears that KRSD-TV is providing a signal of acceptable quality," the order staying the rules would remain in effect. We must reject Black Hills' contention that the 1968 private agreement between it and the cable operator for carriage of KRSD's signal on the cable system constitutes proof of the satisfactory quality of its signal. The cable operator's agreement to withdraw its waiver request (which, in

[22]This is the letter referred to in footnote 5 and in paragraph 19, *supra*, as not being a part of the record and not being in compliance with Section 1.106(c).

itself, was not implemented until August 1969 (see footnote 4, *supra*)), does not satisfy the above condition precedent and does not undermine the validity of the Commission's reliance upon ***Black Hills Video Corporation, supra.*** That there are other reasons, aside from improved signal quality, which may have motivated this agreement may be inferred from a closer examination of the text of the contract. The opening "whereas" clauses (to which petitioner did not refer) indicate that one of the reasons for the agreement was that "KRSD-TV desires to utilize one (1) channel of common carrier microwave service over the routes now used by Mountain Microwave to serve CABLE at low rates made possible by multi-channel services being rendered to CABLE." Thus, the withdrawal of the waiver based upon the private agreement between the parties does not necessarily establish, as Black Hills submits, that it has provided a picture of usable quality since 1968. We note further that Paragraph 4 of the agreement (quoted in footnote 9, *supra*) permits the CATV operator to duplicate all of Black Hills' network programming except for the distant station's local commercials and identifications. The effect of this paragraph was to insure the cable system of a usable network signal from a distant station if KRSD was not providing a usable picture.

25. Moreover, we are of the opinion that Black Hills' failure to reply to the January 3, 1966, letter, *supra*, permits a reasonable inference to be drawn that its picture *was* unusable from 1965 on. This view is reinforced by Black Hills' own petition for reconsideration which states that "KRSD's signal has been of a usable quality since late 1968 after the station received temporary authority to operate with a new antenna system" (*Black Hills' Petition for Reconsideration* at p.

3). This statement is tantamount to an admission that KRSD was not providing a usable picture from at least 1965 through "late 1968." If Black Hills did in fact provide improved service from late 1968 through the hearing in March 1969, this does not necessarily establish that improved service has continued since that time or that it will continue in the future. Indeed, we believe that the record shows that the picture quality declined after March 1969. After the close of the hearing, when Black Hills had knowledge of the deficiencies and time to correct them, and was urged by the Examiner to do so, a July 1969 inspection established that KRSD and KDSJ were "*still* in substantial violation of the *same* rules that the 1966 and 1967 inspections found . . . ." (32 FCC 2d at p. 199). It must therefore be concluded that Black Hills has failed to make an adequate showing, by these arguments regarding the purported withdrawal of the waiver request, that the Commission was in error regarding its conclusion on Black Hills' quality of service.

26. The remaining portion of the licensee's argument regarding quality of service is founded on its Petition to Reopen and Update the Record, by including therein over one hundred letters and multi-signature petitions (copies attached to its Petition) which it solicited by broadcast announcements to viewers in its area, in an effort to have the Commission reconsider the denials of renewals. KRSD claims that these solicited letters, "plus over one thousand more on file at KRSD-TV are evidence that the stations are providing service to the public, and that any finding to the contrary is without basis in fact." As has been indicated above, as far as the record in the proceeding compiled thus far is concerned, there is no credible evidence that the licensee has been affording the public in Rapid City with a usable signal of required

quality. However, Black Hills now offers the letters and petitions it has solicited as proof that it provides a satisfactory signal to its viewers. In this connection, the licensee was apparently aware of the threshold showing it must make, in terms of Section 1.106, quoted above, before the Commission will accept this "11th Hour 'evidence' ". It therefore alleges in its petition to reopen that:

> Although most of the material being presented at this time might have been offered earlier, there is good cause for the Commission to accept the petition and reopen the record at this time. In its Decision, the Commission noted the uniqueness of this case in that ordinarily, technical violations, standing alone, would not form a basis for denial of renewal of license. The Commission should have the benefit of a recent sampling of opinion from the areas most greatly affected, as well as clarification of matters discussed in its Decision. The licensee never attempted to solicit letters or petitions heretofore, since at the hearing it was believed that the petitions were brought into proper perspective by testimony of public witnesses. Moreover, the Examiner, in his Initial Decision, did not place much weight upon these petitions. He noted in Paragraph 26 in his Decision that Eli Daniels and Dail were involved in litigation together, as well as other factors which tended to diminish the weight attached to these petitions. (Petition to Reopen, para. 4).

27. The foregoing hardly suffices to satisfy the conditions precedent to a reopening of record, set forth in Section 1.106 (see footnote 21, *supra*). Moreover, there does not appear to be any valid basis for petitioner's apparent argument in this regard that these proffered materials (including Eli Daniels' affidavit) are necessary

"to round out the record in this case which is presently lacking in certain details and make it subject to conjecture and speculation" and that the materials will serve "... as clarification of matters discussed in its Decision." Presumably these "matters" are "the 1967 petition signed by 2000 viewers concerning the quality of the picture being offered by the licensee ..." which ... "led to the finding that the licensee has not been providing Rapid City and Lead with a picture of usable quality for a number of years...." (Petition p. 1, 2, 3). We must point out, however, that the question of quality of service, which was, in part, the basis of the Decision herein, involved the same issues of which the licensee had notice at the time of designation for hearing; and that he has not made *any* showing, let alone a sufficient showing, as required by the Rules, that he could not have produced such evidence as the viewers' petitions and letters at the time of the hearing. Our rules and long held Commission precedent do not permit the petitioner, at this late date, to make a case which he had failed to make at the time of the original hearing.[23]

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[23]See *WWIZ, Inc.*, 4 FCC 2d 608 (1966), in which the Commission stated:

> The end of the judicial process cannot be regarded simply as a signal to begin anew with pleas to the agency. Only a strong and compelling case would warrant taking up the matter again after the agency and judicial process has been completed. No such showing has been made here.

Semble, *La Fiesta Broadcasting*, 2 FCC 2d 255 (1965), and cases cited therein; and *Central Coast Television* (KCOY-TV), 3 FCC 2d 524 (1966), in which the Commission likewise held that:

> Under Section 1.106(c) of the rules, a petitioner who predicates a request for reconsideration of an order on facts not previously submitted to the Commission must establish either that such facts relate to new or changed circumstances or that they were previously unknown to petitioner and

28. Despite our conclusion to deny Black Hills' Petition to Reopen and Update the Record, we have nevertheless, in our discretion, examined the proffered materials in the desire to afford the licensee every consideration in the circumstances and to determine whether public interest factors require that we take account of the above-described letters and petitions.[24] However, upon examination of the text of the letters, in the light of the nature and content of the broadcast solicitations, it becomes crystal clear that the writers in the area were primarily concerned about losing a second source of programming, as well they might. We need not question the "bona fide" of the letters and petitions[25]; taking them at their face value will indicate that the letters themselves are proof not so much of the quality of the signal (which petitioner asserts), as they are of the demand of the viewers for continuance of the CBS programming and the existence of two competitive stations in the community for a choice of programming.[26] Since there never was any intention by the

> could not have been ascertained through the exercise of ordinary diligence.... Now that the Commission's determination has been adverse to Kay, it proposes to try a different approach and to rely on a new [engineering] showing.... (3 FCC 2d 525).

[24] A similar procedure was followed in *Central Coast Television, supra.*

[25] It might be noted that some of the letters (see e.g. exhibits A 87, 108, 110, etc.) refer to, and are apparently in response to an article published in the Rapid City Journal of November 2, 1971 (a day after release of the Commission's Decision). It would appear from the contents of these letters that the newspaper article is a report of Mr. Daniel's views of the Commission's Decision; however, no copy of this article was submitted by the licensee in the voluminous materials attached to the petition.

[26] It does not even seem necessary, in the circumstances, to determine whether, in soliciting its viewers to write to the Commission regarding the merits of its Decision, the licensee was in violation of Section 1.1225(a) of the Rules regarding prohibited *ex parte* presentations.

Commission of deleting the allocation of Channel 7 from Rapid City in this proceeding, and if it had been made clear to the public that the real reason for the Commission's denial of renewal was because of Black Hills' neglect over the years of its obligation to the community, we are convinced that the reaction by the citizens would have been quite different.

29. In any event, these letters and petitions could only be given very minimal weight, since they are not directed primarily to the crucial questions in this proceeding, namely, the quality of the licensee's signal and the assurance that he can be relied upon in the future to observe his responsibilities as a licensee. Accordingly, we hold that the proferred letters and petitions cannot justify the grant of a renewal to a licensee who has failed to uphold his obligation to operate in the public interest.

Technical Violations

30. As summarized above, the second of the licensee's main contentions is that the technical violations were not attributable to the licensee's fault. Black Hills recites previously stated excuses for its inadequate technical service and argues that the Commission's reliance on *Brooklyn Broadcasting Corporation*, 4 FCC 521 (1937), is misplaced because, here, the causes of equipment failure were beyond reasonable human control. As examples of factors not "reasonably within human control", Black Hills refers to the 1967 tornado which severely damaged its antenna tower, the fact that its source of network programming has been poor, and that KRSD-TV's Dumont transmitter "is not much good."[27]

[27]The transmitter is no longer type-approved, but its use has been "grandfathered" by the Commission. 32 FCC 2d at p. 217.

We believe, however, that these excuses, even if true, do not overcome the licensee's long history of failing promptly to re-establish service or correct problems after they arose. For example, seven months elapsed between the date of the 1967 tornado damage and the time Black Hills filed for a new antenna system. Two inadequate excuses are offered for the 7 month delay: (1) antenna problems are difficult to diagnose, especially absent a standby antenna, and (2) the preparation of an antenna applicaton is complicated and time consuming. However, neither of these explanations adequately explains the delay. Nor has Black Hills shown that the technical deficiencies which caused the poor picture quality found during the 1961, 1966, 1967 and 1969 inspections were not due to causes which a reasonably prudent and efficient broadcaster would have had the capacity to correct. Moreover, it took three inspections and three years before Black Hills corrected the spurious emissions from the KDSJ-TV transmitter, which, as the Commission's Decision indicated, constituted a potential hazard to aviation control frequencies, and this was in the vicinity of Ellsworth Air Force Base. Therefore, it must be concluded here also that the licensee has failed to justify reconsideration of our Decision.

Lack of Funds

31. Another argument has been advanced by Black Hills, at this late stage of the proceeding, by its assertion that were it not for the Commission's failure to grant its new antenna application, it could have upgraded its facilities to improve its service; and that, absent a grant, it is financially unable to make necessary corrections, including replacement of KRSD's antiquated Dumont transmitter. This argument compels a conclusion that

Black Hills is not financially qualified to remain a licensee. Financial qualification spans the entire term of a license, and must be shown specifically at renewal time. The Commission cannot accept the extra-record allegations made at oral argument,[28] and again in the licensee's instant pleadings, that a grant of the new antenna application will increase Black Hills' network compensation and increase its advertising revenues, at least to the extent of enabling it, as it claims, to make necessary repairs and replacements. Black Hills claims in this regard, therefore, must be regarded as merely speculative.[29] As the Bureau has argued, for the licensee to improve its financial status, it must improve its service so that more potential viewers will watch the stations. The record establishes that Black Hills has failed to do this and cannot be relied upon in the future to carry out its obligations and responsibilities as a licensee.

32. For all of the foregoing reasons, we conclude that the Black Hills petition for reconsideration and its petition to Reopen and Update the Record must be denied.

33. ACCORDINGLY, IT IS ORDERED, That the Petition for Reconsideration, filed by The Heart of the Black Hills Stations, of our Decision released November 1, 1971, FCC 71-1102, denying renewal of licenses of television broadcast stations KRSD-TV, Rapid City and KDSJ-TV, Lead, South Dakota, IS DENIED;

34. IT IS FURTHER ORDERED, That the Petition to Reopen and Update the Record herein filed by the above-mentioned licensee IS DENIED;

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[28] At oral argument, Black Hills' counsel stated that "[m]any of their problems are caused by equipment that is less than first-rate, but which just cannot be replaced on account of insufficient capital." *Transcript of Oral Argument* at p. 664.

[29] *Id.* at pp. 671-72.

35. IT IS FURTHER ORDERED, That in order to enable The Heart of the Black Hills Stations to wind up its affairs IT IS AUTHORIZED to operate stations KRSD-TV and KDSJ-TV until 12:01 a.m., October 1, 1972; PROVIDED, however, that if The Heart of the Black Hills Stations seeks judicial review herein, it is authorized to continue to operate stations KRSD-TV and KDSJ-TV until thirty (30) days after the final disposition of such appeal.

FEDERAL COMMUNICATIONS COMMISSION

Ben F. Waple
Secretary

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

[No Opinion]

No. 72-1804 September Term, 1972

THE HEART OF THE BLACK HILLS STATIONS,
Appellant

v.

FEDERAL COMMUNICATIONS COMMISSION

Appeal from Orders of the Federal Communications Commission.

Before: BAZELON, Chief Judge, and WRIGHT and MacKINNON, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal from the Federal Communications Commission, and was argued by counsel. While the issues presented occasion no need for an opinion, they have been accorded full consideration by the court. *See* Local Rule 13(c).

Substantial evidence in the record supports the findings of the Commission, and we find no abuse of discretion in its judgment. The hearing examiner, whose findings except as modified the Commission adopted, recommended a one-year renewal of the licenses in question, with an additional recommendation that there

be a further inspection by the Commission of the two stations. A further inspection was made, and the inspection indicated that the violations found by the hearing examiner were continuing. Thus after almost a decade of repeated and serious violations of the Commission's rules and regulations governing the technical requirements for operation of broadcast stations, . the Commission reluctantly concluded that the applications for renewal should be denied.

On consideration of the foregoing, it is ORDERED and ADJUDGED by this court that the orders of the Federal Communications Commission appealed from in this cause are hereby affirmed.

Per Curiam

SUPREME COURT, U. S.

No. 73-269

OCT 2 1973

In the Supreme Court of the United States

OCTOBER TERM, 1973

HEART OF THE BLACK HILLS STATIONS, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

JOHN W. PETTIT,
General Counsel,
Federal Communications Commission,
Washington, D.C. 20554.

In the Supreme Court of the United States

OCTOBER TERM, 1973

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MEMORANDUM FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

Under Section 301 of the Communications Act of 1934, authorization from the Federal Communications Commission, under a public interest standard, is a prerequisite for transmission of television broadcast signals in the United States. See 47 U.S.C. 301. This authority must be renewed every three years. See 47 U.S.C. 307(d). The question presented is whether the court of appeals properly concluded that substantial evidence in the record supports the Commission's conclusion that repeated violations of the Commission's technical regulations by the licensee of two South Dakota television stations warranted the Commission's refusal to renew these licenses.

1. Petitioner, Heart of the Black Hills Stations, applied to the Commission in December 1967 for renewal

of licenses of television broadcast stations KRSD-TV, Rapid City, and KDSJ-TV, Lead, South Dakota. Since the licensee had received Official Notices of Violations of the Commission Rules and Regulations in 1966 and 1967, the Commission designated the renewal applications for hearing to determine the nature and extent of the violations.

The Hearing Examiner concluded (Pet. App. 26a-27a) that during 1966 and 1967, the stations operated in "substantial violation of the Commission rules." The Examiner found that during this period "hundreds of viewers complained to the Commission over the poor quality of the service they were receiving* * * " (Pet. App. 26a). Although the licensee was well aware of the technical steps necessary to improve service prior to the Examiner's final decision, "an inspection of the stations * * * found the stations still in substantial violation of the Commission rules" (*ibid.*). Although the Examiner found that "[w]ith such a background, it is not easy to find justification for renewal * * * * " (Pet. App. 26a), he nevertheless concluded that the licenses should be renewed for a period of one year.

On appeal the Commission adopted the Examiner's findings but concluded that the licensee's failure to provide adequate service to the communities served during a ten-year period "compelled * * * the conclusion that renewal is neither justified nor warranted in the public interest" (Pet. App. 5b). In the Commission's view, "[t]he number, nature and extent of the violations reflected in the record of this proceeding represent perhaps the most flagrant dereliction of a licensee's responsibility in the operation of its television stations that has yet to come before the Commission" (*id.*).

The court of appeals affirmed *per curiam*. It held that substantial evidence in the record supports the Commission's findings "* * * after almost a decade of repeated and serious violations of the Commission's rules and regulations governing the technical requirements for operation of broadcast stations * * *" and that the Commission had not abused its discretion in making its judgment (Pet. App. 1d-2d).

2. The issues presented turn essentially on the facts of this record. The Commission carefully examined the technical quality of service rendered by the licensee during the past ten years to determine whether the public interest would be served by renewal of the licenses, but found that service had been almost continuously inadequate. Inspections of Black Hills' facilities in 1961, 1966, 1967, 1969, and 1971 revealed serious and repeated violations of regulatory requirements designed to assure the public satisfactory operation. During the 1966 and 1967 inspections the Commission found "56 infractions of 33 separate rule violations" (Pet. App. 3b n. 3). This unsatisfactory record "had the cumulative effect of depriving the public of the very service for which the licenses were originally granted * * *" (Pet. App. 5b). In these circumstances, the Commission soundly exercised its administrative responsibility in concluding that the public interest would best be served by refusing to renew the licenses. See *Federal Communications Commission* v. *WOKO Inc.*, 329 U.S. 223, 229. The past performance of a station licensee is certainly the most informative basis upon which the Commission can render a judgment in the public interest. *Office of Communication of United Church of Christ* v. *Federal Communications Commission*, 359 F. 2d 994, 1007 (C.A. D.C.).

3. Petitioner's contention that the Commission's failure to grant its pending application for a new antenna prevented petitioner from solving its technical problems was first made in its petition for reconsideration and was properly rejected by the Commission (Pet. App. 13c). Despite its protestations that 1967 tornado damage to its antenna was the source of its problems, the record shows: (1) petitioner's technical deficiencies pre-dated the tornado damage (Pet. App. 3a-10a); (2) seven months elapsed after the tornado before petitioner filed an application for a new antenna (Pet. App. 11c); (3) no evidence was presented to the Commission to indicate that the antenna authorized on an interim basis was inadequate (Pet. App. 25c); and (4) many of Black Hills' problems were attributable to faulty transmission line supports which were first brought to the licensee's attention in 1961 and could have been replaced at any time for $500 (App. 45-54).[1]

4. Contrary to petitioner's contention (Pet. 10), no evidence was presented to the Commission to support the assertion that the quality of its television picture has improved to the point that it can assure network programming to Rapid City, thus making it unnecessary for the community to rely on cable television (CATV). As a result of petitioner's deficiencies, the Commission has waived CATV rules which would otherwise restrict CATV importing a distant signal in that area. The Commission's 1966 waiver was premised on a letter from the then operator of the CATV system, which alleged that the KRSD signal was "of [a] totally unusable quality" (Pet. App. 18c), and therefore inadequate for cable distribution purposes. Petitioner offered no comment in 1966 concerning this mat-

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[1] "App." refers to the joint appendix in the court of appeals.

ter.[2] Its only subsequent showing before the Commission was a private agreement by which the cable company withdrew its request for waiver of the restrictions. Nevertheless the agreement retained provisions permitting the CATV system to "assure a usuable network signal from a distant station *if KRSD was not providing a usable picture*" (Pet. App. 19c, emphasis added). The Commission properly rejected this statement as establishing that KRSD was now providing an acceptable signal.

The court of appeals has found the Commission's findings to be supported by substantial evidence in the administrative record. Further review of petitioner's evidentiary contentions is not warranted.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

JOHN W. PETTIT,
General Counsel,
Federal Communications Commission.

OCTOBER 1973.

CERTIORARI DENIED

[2] Although petitioner requested non-duplication protection in September 1966 (Pet. App. 5c), it offered no evidence in support of its request, and as the Commission inspection in 1969 revealed, poor picture quality continued (Pet. App. 8c).